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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,

Petitioner,

v.

TOM VILSACK,
Secretary of Agriculture,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair and Equitable Tobacco Reform Act, Pub. L. No. 108-357, 118 Stat. 1524 (codified at 7 U.S.C. § 518 *et seq.* (2004)) ("FETRA") requires one class of private parties (cigar manufacturers) to make hundreds of millions of dollars in payments for the benefit of another class of private parties (former beneficiaries of the recently discontinued federal tobacco price support program), despite the absence of any meaningful connection between the parties Congress sought to assist and those Congress singled out to be burdened.

The court of appeals, relying heavily on this Court's splintered decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), held that monetary assessment schemes are not cognizable under the Takings Clause at all, and that, unlike the statute struck down in *Apfel*, FETRA comports with Due Process because it is not "retroactive."

The questions presented are:

1. Whether monetary assessment schemes are *per se* immune from Takings Clause scrutiny on the ground that money is not "property" within the meaning of the Fifth Amendment?

2. Whether the highly deferential standard that governs Due Process challenges to ordinary regulatory or taxing legislation is appropriate where the law at issue effects a direct wealth transfer from one class of private parties to another?

CORPORATE DISCLOSURE STATEMENT

Petitioner Swisher International, Inc. states that it is a wholly owned subsidiary of Swisher International Group Inc. No publicly held corporation owns ten percent or more of the stock in either Swisher International, Inc. or Swisher International Group Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eleventh Circuit (App., *infra*, 1a-23a) is reported at 550 F.3d 1046. The opinion of the District Court (App., *infra*, 24a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2008. Justice Thomas extended the time for filing this petition to and including May 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The various provisions of FETRA are set forth in the Appendix at 71a-94a.

STATEMENT

This case raises important questions about the nature and degree of the protections afforded by the Takings Clause and the Due Process Clause that were addressed, but not settled, by this Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

As the decisions below recognized, FETRA is a highly unusual – indeed, unique – statute. It provides for cash compensation to one group of private parties (those who benefited from the federal government's tobacco price support program) that is funded by massive assessments imposed on other private parties (cigar companies) that have no real connection to, let alone responsibility for, the problem Congress sought to address. The district court did not hesitate to pronounce this regime "incongruous," "unpalatable," "onerous," and "unjust." App., *infra*, 49a, 70a.

That court and the court of appeals nonetheless sustained FETRA, ruling that neither the Takings Clause nor the Due Process Clause provides a basis for invalidating – or even meaningfully examining – the scheme. As the Eleventh Circuit emphasized, its effort (and those of other courts throughout the country) to analyze these important constitutional questions was complicated by this Court's enigmatic decision in *Apfel*, in which similar, unorthodox federal legislation was held invalid, but in which no ground for the Court's judgment garnered majority support.

Review by this Court is warranted in order to dispel that widely recognized confusion, and to clarify that the highly restrictive view of the Takings and Due Process Clauses espoused by the courts below is untenable.

A. Statutory Framework

In 1938, Congress enacted the Agricultural Adjustment Act to address concerns about price and supply

fluctuations in commodities markets and their effects on farm incomes. Pub. L. No. 75-430, 52 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.). The Act replaced free markets for various commodities, including tobacco, with a complex system of supply controls and price supports to be administered by the Department of Agriculture. *See generally Wickard v. Filburn*, 317 U.S. 111, 115 (1942).

During the ensuing decades, these quota and price support programs were the subject of repeated reform and repeal efforts. Congress grew concerned, among other things, that benefits were being distributed to large businesses, and that artificially inflated prices were burdening consumers and placing American producers at a competitive disadvantage in increasingly global markets. With respect to domestically grown tobacco, the erosion of demand attributable to foreign competition was aggravated by an abrupt drop in demand from cigarette manufacturers, long the dominant purchasers of domestic tobacco, as a result of obligations imposed under their landmark 1998 settlement agreement with 47 States. *See generally North Carolina v. Philip Morris USA Inc.*, 618 S.E.2d 219 (N.C. 2005). By 2004, Congress had determined to discontinue the tobacco price support program.

Congress recognized that the sudden discontinuation of the tobacco price support program after so many decades could have severe consequences for those who had come to rely on it, many of whom were elderly. *Tobacco Quota Buyout: Hearing Before the House Committee on Agriculture*, 108th Cong. 4 (2003), at 18. As it had with other commodities, Congress decided to ease these hardships with a "buyout." Congress therefore enacted FETRA, which entitles former program participants to receive payments of $9.6 billion over ten years (2005 through 2014).[1]

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[1] The statute provides for $10.14 billion in funding. 7 U.S.C. § 518f. Of this amount, $9.6 billion will be paid to price support program participants, and the remainder will reimburse the

Eligibility for these payments is not limited to those who actually were growing tobacco at the time of the statute's enactment. To the contrary, Congress provided that payments will be made not only to tobacco "producers," but also to "quota holders" – those persons who were allocated the right to grow a given amount of tobacco under the former system, most of whom exercised their prerogative to transfer that right to others. 7 U.S.C. §§ 518a, 518b.

Indeed, Congress expressly provided that seventy percent of FETRA's buyout funds (approximately $6.7 billion) will be paid to the approximately 415,000 tobacco quota holders, with thirty percent ($2.9 billion) allocated to the approximately 57,000 tobacco producers. Taking into account that some quota holders are also producers, the large majority of the funds will be paid to an estimated 358,000 non-operator landlords who were not producing tobacco when FETRA was enacted, many of whom had not done so in years if not decades. Jasper Womach, *Tobacco Quota Buyout*, Congressional Research Service, Library of Conference, Report to Congress No. RS22046, at 2 (Dec. 31, 2005).[2]

Although FETRA payments are nominally made pursuant to "contracts" between the federal government and the recipients, 7 U.S.C. §§ 518a(a), 518b(a), these agreements do not impose any future obligations on the recipients. To the contrary, FETRA provides for and allocates payments to

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Commodity Credit Corporation for losses it sustained selling leftover tobacco pool stocks it had purchased at inflated prices.

[2] FETRA entitles quota holders to collect a total of $7.00 per pound ($.70 per year for 10 years) for their 2002 quotas. 7. U.S.C. § 518a(e). Producers are entitled to collect a total of $3.00 per pound ($.30 per year for 10 years) for their 2002 productions. *Id.* § 518b(d). The total national quota was approximately 960 million pounds in 2002, yielding a total of $9.6 billion in FETRA payments.

former program participants based exclusively on their past quota/production levels – specifically, those in 2002. *Id.* §§ 518a(c), 518b(c).

Unlike comparable "buyout" and other social welfare programs, however, FETRA's payments to former price support program beneficiaries do not come from the general treasury. FETRA is funded entirely through assessments on private parties: manufacturers and importers of various types of tobacco products. *Compare, e.g.*, Pub. L. No. 107-171, 116 Stat. 179 (codified at 7 U.S.C. § 7959 (2002)) (providing for buyout of peanut quota holders to be funded by the general treasury).

Although the tobacco price support program focused principally on the two types of tobacco used in cigarettes (flue-cured and burley), Congress decided that the payments to past program beneficiaries will be funded through monetary assessments imposed on manufacturers of *all* types of tobacco products, including cigars, which are made primarily with a type of tobacco (air-cured) that was not part of the price support program. Each year, the Secretary of Agriculture allocates liability among the manufacturers of the six types of tobacco products – cigarettes, cigars, snuff, chew, roll-your-own, and pipe tobacco – based on the current aggregate domestic sales of each type. 7 U.S.C. §§ 518d(b)(3), d(c), d(e).

The face of the statute suggests that these newly-imposed obligations will be borne overwhelmingly by cigarette manufacturers, which collectively account for over 96% of overall domestic sales of tobacco products. *Id.* § 518d(c)(1)(A). However, those companies were, as Congress was keenly aware when it enacted the statute, *already* legally obligated to pay more than $5 billion to tobacco growing interests pursuant to their global settlement agreement with the States. *North Carolina v. Philip Morris USA Inc.*, 618 S.E.2d 219, 221-24 (N.C. 2005). That settlement agreement expressly provided that the cigarette manufacturers' liability

to the growers would be reduced, dollar for dollar, if an assessment scheme such as FETRA were ever enacted. *Id.* Had Congress raised excise taxes rather than enacting an assessment scheme, this offset would not have been triggered. This undoubtedly accounts in large part for the fact that, very much unlike other tobacco-related legislation, FETRA did not encounter significant political opposition from cigarette manufacturers, and that Philip Morris actively supported it.

B. Proceedings Below

Petitioner Swisher International, Inc. ("Swisher") is one of the country's leading cigar manufacturers. After it made its first FETRA payments and exhausted its administrative remedies, Swisher commenced this action against the Secretary of Agriculture, maintaining, *inter alia*, that FETRA violates the Takings and Due Process Clauses of the Fifth Amendment.[3]

Rather than engaging in discovery, the parties agreed to stipulate to the relevant facts and to litigate the constitutionality of FETRA's application to Swisher on cross-motions for summary judgment. App., *infra*, 95a-99a.

In opposing the government's motion, Swisher maintained that FETRA's unorthodox character and the severe and unjustifiable special burdens it imposes render it an unconstitutional taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *see id.* at 123-28 (requiring courts to consider the economic impact of the regulation; the owner's reasonable investment-backed expectations; and the character of the regulatory action).

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[3] Swisher also raised an Equal Protection challenge to the manner in which FETRA allocates assessment liability among the six types of tobacco products.

Swisher demonstrated that it has been severely impacted by FETRA. During the first calendar year after FETRA was enacted, Swisher was assessed and paid over $11 million to fund the government's buyout payments to quota holders and producers. By 2014, Swisher likely will have been compelled to pay in excess of $100 million.

Swisher further highlighted a number of unusual and constitutionally troubling attributes of the FETRA regime, including (i) that the assessments, which are paid to past beneficiaries of government support without imposing any present or future obligations, cannot be described as "regulating" the tobacco market; (ii) that the assessments have no nexus to any past harm Swisher caused quota holders or producers or any benefit Swisher derived from the price support program; and (iii) that the assessments are, by design, grossly disproportionate to Swisher's *de minimis* connection to the price support program.

Indeed, although Swisher purchased scarcely one-thirtieth of one percent (0.0305%) of the tobacco subject to the program during the six years leading up to the enactment of FETRA, its share of the total FETRA funding obligation for 2005 was nearly 30 times as large. App., *infra*, 96a-97a (Stipulation ¶¶ 13-18).

Swisher argued that these features are strikingly similar to – but even worse than – those that led this Court to strike down the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act") in *Apfel*. Relying on the four-Justice plurality opinion concluding that the Coal Act violated the Takings Clause, Swisher demonstrated that FETRA similarly imposes severe liability "on a limited class of parties that could not have anticipated the liability," and that its liability is "substantially disproportionate to" any connection to the beneficiaries that could support requiring Swisher to underwrite their buyout. *Id.* at 528-29. Recognizing that the lead opinion in *Apfel* is not itself controlling, Swisher maintained that the aspects of FETRA that rendered it

unconstitutional under the *Apfel* plurality's Takings Clause analysis likewise condemn the statute under the alternative Due Process Clause analysis advocated in Justice Kennedy's concurring opinion.

Rather than addressing the statute's design and operation, the government's submissions consisted almost entirely of doctrinal arguments aimed at insulating FETRA from meaningful scrutiny. The government first contended that, although FETRA's payments are neither paid into nor from the general treasury, FETRA should be treated as a "tax," rather than an assessment scheme, such that the Takings Clause is inapplicable. The government then argued that the Takings Clause is *per se* inapplicable to statutes requiring the payment of money (as opposed to other forms of private property), and that *Apfel* is distinguishable because FETRA is not "retroactive" in the sense that the Coal Act was.[4]

The district court bluntly acknowledged the manifest unfairness of FETRA's assessment scheme, particularly as applied to cigar manufacturers like Swisher. It rejected the government's argument that FETRA should be considered a tax, but nonetheless granted the government summary judgment. The court disposed of Swisher's Takings claim in a single sentence, holding that the Clause is not implicated when one person is required "to use his or her assets for the benefit of another." App., *infra*, 56a. The court then accepted the government's argument that Swisher's Due Process claim should be reviewed (and rejected) under the highly deferential standard applicable to ordinary regulatory measures. *Id.* (citing *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976)).

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[4] The government conceded that jurisdiction was proper before the district court, and that the Tucker Act did not require Swisher to bring its claims in the Court of Claims. FETRA expressly so provides. 7 U.S.C. § 518d(j).

The Eleventh Circuit affirmed. Acknowledging the importance of *Apfel* to the disposition of this case, the panel majority attempted to identify a controlling opinion in *Apfel* by applying the "narrowest ground" test articulated in *Marks v. United States*, 430 U.S. 188 (1977). Recognizing that other courts of appeals had divided over which (if any) of the *Apfel* opinions should govern, the court concluded that neither the plurality nor the concurring opinion was binding. Engaging in its own constitutional analysis, the court held that the Takings Clause is "not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation." App., *infra*, 14a. The court reasoned that the Takings Clause does not apply to monetary deprivations because it "operates only as a conditional limitation, permitting the taking so long as the government pays just compensation," and not "a substantive or absolute limit on the government's power to act." *Id.* Acknowledging that this Court has, in a number of cases, applied the Takings Clause to laws requiring the payment of money, the court distinguished those decisions on the ground that they involved "separately identifiable fund[s] of money," *id.* at 16a, and "some semblance" of a property interest, *id.* n.9.[5]

With respect to Due Process, the court held that the careful scrutiny to which Justice Kennedy's concurrence subjected the Coal Act in *Apfel* is inappropriate in this case because "the obligation upon Swisher * * * is not retroactive." App., *infra*, 17a. Applying "deferential" review, the court accepted Congress's judgment that "tobacco farmers and quota holders should be provided some cushion" from the abrupt termination of the price support regime, and that it was appropriate to single out cigar companies like Swisher to fund it. *Id.* at 19a.

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[5] Judge Cox did not join his colleagues' Takings Clause analysis. Rather, he specially concurred in the judgment. App., *infra*, 23a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted in order to dispel widespread confusion and disagreement among the lower courts about the significance of this Court's decision in *Apfel* – confusion about the procedural question whether *Apfel* is binding precedent for any constitutional rule, and confusion about the substantive question whether monetary assessments implicate "property" interests that are protected by the Takings Clause.

Review is also needed in order to correct a serious and increasingly prevalent misunderstanding, typified by the decision below, regarding the manner in which narrowly targeted monetary assessment schemes implicate Due Process Clause concerns. Like most courts, the Eleventh Circuit read *Apfel* to stand for the proposition that monetary assessment schemes that are not "retroactive" will be upheld unless they are wholly irrational. Such talismanic focus on "retroactivity" tears the Due Process inquiry from its moorings: whether there is a constitutionally sufficient *nexus* between the private parties that are benefited and those that are burdened, and whether there is sufficient *proportionality* between the burden imposed and the burdened party's responsibility for the problem. "Retroactivity" is one way to demonstrate the absence of such a nexus and proportionality, but there surely are others.

This case presents a stark example of the danger of applying garden-variety rational basis review to an assessment scheme that, while not "retroactive" in the precise sense that the Coal Act was, is devoid of any meaningful nexus between the transferors and the transferees; that imposes highly disproportionate burdens; and that evaded the political process that ordinarily constrains broadly applicable taxing and regulatory measures.

This case is an especially appropriate vehicle for addressing these issues because the Eleventh Circuit was presented with and rejected claims that FETRA violated both the Takings and the Due Process Clauses, and because this appeal arises from a very simple and truly undisputed factual record consisting of a narrow set of facts to which the parties have stipulated. App., *infra*, 95a-99a.

I. THIS COURT SHOULD CLARIFY THAT NEITHER *APFEL* NOR ANY OTHER PRECEDENT PERMITS THE RESTRICTIVE VIEW OF THE TAKINGS CLAUSE ESPOUSED BY THE COURT BELOW

A. The Lower Courts Are Deeply Divided Regarding How to Read *Apfel* and Regarding Whether Monetary Assessment Schemes Implicate the Takings Clause

As the Eleventh Circuit expressly recognized, this Court's Takings Clause jurisprudence has engendered widespread disagreement and confusion among the courts of appeals in two fundamental respects.

First, the courts of appeals are split regarding whether there is a controlling opinion in *Apfel*.

At least four federal Circuits (the First, Third, Fourth, and Federal Circuits) have held that Justice Kennedy's concurrence, coupled with the views expressed in the

dissenting opinion in *Apfel*, constitute five votes – and hence binding authority – for the proposition that monetary assessment schemes do not implicate the Takings Clause. *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 237 & n.7 (4th Cir. 2002); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-39 (Fed. Cir. 2001); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999); *Parella v. Ret. Bd. of the R.I. Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999). These courts held that they were "bound to follow the five-four vote against the takings claim in [*Apfel*]." *Unity Real Estate*, 178 F.3d at 659.

Six other Circuits (the Second, Sixth, Eighth, Ninth, and D.C. Circuits, and now the Eleventh Circuit) have held that *Apfel* did *not* settle whether monetary assessment schemes implicate the Takings Clause. *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 852 (9th Cir. 2004), *rev'd on other grounds sub nom., Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *United States v. Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998). These courts have held that "the inability of a majority of the Court to agree on a single rationale for the result renders [*Apfel*] of no precedential value outside of the specific facts of the case." *Chevron*, 363 F.3d at 852.

Under any circumstances, such marked confusion regarding the holding in *Apfel* would warrant this Court's review. At a minimum, lower courts should not be compelled to devote so much time and effort attempting to divine whether there is even a binding holding in *Apfel*.

Moreover, among those courts that, like the Eleventh Circuit, have concluded that *Apfel* is not binding authority with respect to the Takings Clause, there is significant division as to the underlying substantive question: whether

monetary assessments are subject to challenge under the Takings Clause.

The Eleventh Circuit held below, for example, that the Takings Clause is "not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation." App., *infra*, 14a. That holding conflicts with the Fifth Circuit's decision in *United States Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000). *McKeithen* struck down as an unconstitutional taking Louisiana's Workers' Compensation Second Injury Fund, which required insurers to contribute money to a common fund earmarked for compensating previously disabled workers who were injured for a second time. In doing so, the Fifth Circuit considered and rejected the notion that the Takings Clause imposes no limit on the government's power to take money through an assessment scheme. *Id.* at 420.[6]

The Eleventh Circuit's holding also cannot be reconciled with decisions of several state courts of last resort holding that monetary obligations imposed to "offset" the impact of development are subject to Takings Clause scrutiny. *See., e.g. Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *see also Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620 (Tex. 2004) (applying Takings Clause to condition that developer must

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[6] Attempting to harmonize these divergent holdings, the Eleventh Circuit suggested that *McKeithen* "did involve an identifiable property interest" – presumably the specific sums of money that were assessed pursuant to the Louisiana scheme. App., *infra*, 16a n.7. The Eleventh Circuit made no attempt, however, to explain how the "identifiable property interest" at issue in *McKeithen* is in any way different from the specific and identifiable property interest in this case: the $11,069,140.61 that Swisher was assessed pursuant to FETRA in 2005, coupled with the equally specific assessments it has been forced to pay in years since.

pay for adjacent road upgrades); *but see McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008).

B. The Eleventh Circuit's Holding that Monetary Assessments Are Not Subject To Takings Clause Scrutiny Is Incorrect and Conflicts With Decisions of This Court, Both Recent and Venerable

More than a century ago, this Court held in *Village of Norwood v. Baker*, 172 U.S. 269 (1898), that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking * * * of private property for public use without compensation." *Id.* at 279 (striking down scheme imposing monetary assessments on adjacent landowners to fund the cost of building a new street).

This Court has on numerous subsequent occasions applied the Takings Clause to government actions that entail the appropriation of money (rather than real or other forms of personal property) from private parties.

For example, *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), involved a requirement that lawyers contribute the interest on their attorney escrow accounts to a common fund. Far from rejecting the plaintiffs' Takings Clause claim on the ground that an obligation to pay money is never a taking, this Court expressly held that the confiscated interest income *was* "private property" and subjected the scheme to Takings Clause review. *Id.* at 172.

Similarly, *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980), held that a statute collecting the interest on court interpleader accounts amounted to an unconstitutional taking. In doing so, this Court stressed that the government "by ipse dixit, may not transform private property" – *i.e.*, money – "into public property." *Id.* at 164; *see also Bowen v. Gilliard*, 483 U.S. 587 (1987) (applying

Takings Clause analysis to Aid to Families with Dependent Children eligibility requirement that included all family members' incomes); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (applying Takings Clause analysis to requirement of Multiemployer Pension Plan Amendments Act of 1980 that employer withdrawing from multiemployer pension plan must pay its proportionate share of the plan's unfunded vested benefits).

These precedents stand for the proposition that the mere fact that the government has taken money (as opposed to some other form of property) does not insulate a statute from the reach of the Takings Clause.[7]

The efforts of the Eleventh Circuit to anchor its categorical restriction in the language of the Constitution do not fare well. The court held that the Takings Clause cannot apply to monetary deprivations because it "operates only as a conditional limitation, permitting the taking so long as the government pays just compensation," and not "a substantive or absolute limit on the government's power to act." App.,

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[7] With all respect, the Eleventh Circuit's effort to harmonize its rule with *Phillips* and *Beckwith* on the ground that the regimes at issue in both of those cases involved "specific, identifiable, property interests" – namely, the interest in specific interest-bearing bank accounts – makes no sense. App., *infra*, 13a n.6. Money, after all, is *fungible*. There simply is no difference between a "specific fund of money" and plain old "money" – and certainly no difference that could rise to the level of constitutional magnitude. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (subjecting claims tribunal fee scheme to Takings Clause scrutiny, but refusing to treat the fee scheme as a "permanent physical occupation" of property constituting a per se taking, because "money is fungible"). It cannot be that the government is forbidden from confiscating a "specific" twenty dollar bill from a citizen, but that the Takings Clause is not implicated where the government orders a citizen to pay over *any* of her twenty dollar bills.

infra, 14a. Post-*Apfel* decisions of this Court conclusively rebut this view. For example, although this Court divided sharply as to the outcome of the constitutional question in *Kelo v. City of New London*, 545 U.S. 469 (2005), opinions signed by all nine Justices recognized that the Takings Clause *can* provide a substantive basis for invalidating governmental action, even though it often is merely a vehicle for demanding compensation.

Moreover, the proposition that money is not "property" within the meaning of the Takings Clause is belied by the fact that *both* the Due Process Clause *and* the Takings Clause are triggered by an assertion of a "property" interest. The Eleventh Circuit's view simply cannot be squared with decisions by this Court such as *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), holding that subjecting civil litigants to excessive punitive damages awards – which impose obligations to pay precise sums of money, but which do not specify the particular funds that must be turned over – are subject to review and invalidation under the Fifth Amendment.

The Eleventh Circuit's assumption that the Due Process Clause (rather than the Takings Clause) is the more appropriate basis for analyzing FETRA's constitutionality also is in tension with this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In rejecting the claim that a particular line of Takings Clause authority supported heightened scrutiny of a commercial rent cap, *Lingle* explained that the Takings Clause is fundamentally concerned with "the *magnitude or character of the burden*" and how the burden is "*distributed* among property owners." *Id.* at 542 (emphases in original). In this case, Swisher's objection is not that it was impermissible or unwise for Congress to provide assistance to tobacco farmers, but rather that it was improper for Congress to fund the buyout by imposing hundreds of millions of dollars in assessments on parties like Swisher that had only a glancing connection to the

government program and no basis to anticipate the imposition of such staggering liability. The lesson of *Lingle* is that such a claim lies primarily (though not necessarily exclusively) under the Takings Clause. *See also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (reaffirming that the core concern of the Takings Clause is that the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The assumption that principles of judicial restraint support analyzing claims under the Due Process Clause, rather than the Takings Clause, is also flawed. This Court has repeatedly admonished that courts should not reach Due Process Clause issues when a more narrow provision of the Constitution is implicated, and that courts should not address open-ended Due Process issues except when necessary. *Albright v. Oliver*, 510 U.S. 266, 271-74 (1994) (plurality opinion); *id.* at 267 (Scalia, J., concurring); *id.* (Ginsburg, J., concurring); *id.* at 281 (Kennedy, J., concurring); *Collins v. City of Harker Heights*, 503 U.S. 115, 125-27 (1992). If anything, therefore, the doctrine of "judicial self-restraint" militates in favor of analyzing Swisher's claim under the Takings Clause, not the Due Process Clause. *Collins*, 503 U.S. at 125; *cf. Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995).

Finally, Justice Scalia's comments in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), explain cogently why the Takings Clause is a proper vehicle for claims such as Swisher's. In that case, Justice Scalia observed that typical rent control schemes – through which landlords are limited in the rents that they may charge tenants – do not effect an unconstitutional taking because "there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." *Id.* at 20 (Scalia, J., dissenting). "When commodities have been priced at a level that produces

exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs." *Id.* But a rent control law that purports to limit the ability of a landlord to charge a fair rent merely because a tenant cannot afford to pay violates the Takings Clause because "*that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages * * * *" *Id.* at 21 (emphasis in original).

To be sure, as Justice Scalia emphasized, the government always remains free to enact a welfare scheme through which rent subsidies are provided to needy tenants. But to survive Takings Clause scrutiny, such welfare schemes must be "supported by all the public" and funded by "the government at large through taxes," and must not "disproportionately burden particular individuals." *Id.* at 21-22. The "essence" of the Takings Clause "is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." *Id.* at 23.

II. THE ELEVENTH CIRCUIT'S MISUNDERSTANDING OF APPLICABLE DUE PROCESS PRINCIPLES HEIGTHTENS THE SIGNIFICANCE OF ITS UNDULY NARROW READING OF THE TAKINGS CLAUSE

In reaching its conclusion that monetary assessments do not implicate the Takings Clause, the Eleventh Circuit relied heavily on Justice Kennedy's concurring opinion in *Apfel*. Ironically, however, the Eleventh Circuit did not similarly heed the view that Justice Kennedy – as well as the four dissenting Justices in *Apfel* – expressed regarding the critical role of the Due Process Clause serves in protecting against the imposition of disproportionate burdens on private

parties to solve social problems with which they have no meaningful connection.

A. "Retroactivity" Is Not a Required Element of a Due Process Clause Challenge to a Monetary Assessment Scheme

As discussed in Section I.A, *supra*, post-*Apfel* courts continue to struggle with whether Justice Kennedy's concurrence constitutes a binding holding on the Takings Clause issue. None of these courts have focused, however, on the fact that the four dissenting Justices in *Apfel* also endorsed the affirmative aspect of Justice Kennedy's opinion: that the Due Process Clause requires robust scrutiny of monetary assessment schemes that are "fundamentally unfair or unjust." *Id.* at 558 (Breyer, J., dissenting). As Justice Breyer emphasized, the mandate for such scrutiny flows from the "basic purpose" the Due Process Clause: "the *fair application of the law*, which purpose hearkens back to the Magna Carta." *Id.* (emphasis in original).

In this case, rather than considering FETRA's unusual and fundamentally problematic character, the court's Due Process analysis focused almost exclusively on whether FETRA is "retroactive." This emphasis on retroactivity was mistaken. The Due Process Clause requires a sufficient *nexus* between the private party whose property is taken and the problem being addressed, and sufficient *proportionality* between the party's responsibility for the problem and the burden that is imposed. As this Court's Due Process Clause jurisprudence makes clear, retroactivity is one way – but only one way – in which this requirement of connection and proportionality can be defeated.

For example, this Court's recent punitive damages precedents have held that "grossly excessive" awards violate tortfeasors' Due Process rights. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *Cooper*

Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2003). The most important indicator of excessiveness is the ratio of the award "to the actual harm inflicted on the plaintiff." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-82 (1996). This inquiry is constitutionally required because it "'helps to assure uniform general treatment of similarly situated persons that is the essence of law itself.'" *Cooper Industries*, 532 U.S. at 436 (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)).

Cases concerning a State's power to tax out-of-state activities are also instructive. This Court has held that the Due Process Clause requires a "definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (quotation omitted). It forbids States from imposing taxes on parties that do not enjoy the "opportunities, benefits, or protection" the State affords. *Ott v. Mississippi Val. Barge Line Co.*, 336 U.S. 169, 174 (1949). This rule derives from the fundamental principle that the Due Process Clause demands the "requisite 'nexus'" between the ends served by a regulation and those subjected to it. *Mobile Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 437 (1980).

These punitive damages and taxation cases confirm that whether a narrowly targeted assessment scheme is "retroactive" is not dispositive – or even particularly significant – to whether it comports with Due Process. None of the statutes or awards that have been struck down in these cases were "retroactive." Rather, the case law focuses on the sufficiency of the nexus and the proportionality of the money paid to the benefit the defendant obtained or the harm it caused.

The connection between Swisher and the beneficiaries of FETRA is even more tenuous, and the impact upon Swisher even more disproportionate, than the statute at issue in *Apfel*. As Justice Stevens observed in that case, there was

at least an "implicit understanding" between coal operators and miners – one that "enabled coal production to continue during the 1950's and 1960's" – that companies like Eastern "would provide the miners with lifetime health benefits." 524 U.S. at 551 (Stevens, J., dissenting). And as Justice Breyer emphasized, the Coal Act "extends only to miners whom Eastern itself employed." *Id.* at 559-61 (Breyer, J., dissenting).

The question raised here – "why Swisher?" -- yields an answer that is far more constitutionally problematic than the one presented in *Apfel*. *Id.* at 558 (Breyer, J., dissenting) ("The 'fairness' question is, why Eastern?"). Although FETRA is similar to the Coal Act in that it imposes onerous burdens on one narrow class of private parties for the benefit of another, there is no suggestion that Swisher or other cigar manufacturers ever promised tobacco price support program beneficiaries (whether expressly or implicitly) that they would fund a "cushion" if the program were ever repealed, nor did Swisher have any employment relationship or other significant privity with the program beneficiaries. Indeed, Swisher's liability to pay FETRA assessments has nothing to do with its past, present, or future connection to the domestic tobacco market. Liability is based solely on its share of current domestic sales – regardless whether it manufactures products with tobacco purchased domestically or overseas, and regardless whether it uses or ever used the kind of tobacco that formerly was subject to quotas and price supports.

FETRA therefore is even worse than "retroactive." At least the Coal Act was based on *some* connection – albeit a past connection – between the burdened and the benefited. In this case, there simply is no meaningful connection *at all*. *See id.* at 560 (Breyer, J., dissenting) (explaining that Coal Act was *more* defensible than a statute that raised money from "other funding sources, say, current coal producers or

coal consumers, who now make or use coal but who have never employed that miner or benefited from his work").

The lack of proportionality is likewise even more pronounced in this case than it was in *Apfel*. Swisher's FETRA liability is more than an order of magnitude greater than what it would have been if assessments were allocated based on past participation in the tobacco price support program.

The lower court's misplaced focus on "retroactivity" blinded it to numerous other unusual and constitutionally troubling attributes of FETRA. For one thing, unlike the Coal Act, FETRA takes money from companies that were *burdened* by the price support program in the past and transfers it to participants who *benefited* from it. *Cf.* 524 U.S. at 560 (Breyer, J., dissenting) (observing that miners' labor "benefited Eastern when they were younger and healthier").

Nor does Swisher derive any prospective benefit – let alone a proportional one – from the buyout it is being compelled to underwrite because there is no requirement that beneficiaries continue to produce tobacco in the coming years. Producers may opt to begin growing other, more lucrative crops, and still collect their FETRA payments. Indeed, the scheme affirmatively erects significant barriers to entry because new entrants into the "free" tobacco market are not eligible for FETRA payments (which are based exclusively on 2002 production levels) and thus face the prospect of a ten-year competitive disadvantage.

Perhaps most significantly, FETRA is funded out of money taken from a narrow class of private parties, rather than from the general treasury. This does not merely offend the core principle that the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It circumvents the orderly lawmaking process, thereby nullifying the significant protections that are built into the

political system. As Justice Scalia explained in *Pennell*, allowing the government to fund social welfare objectives by selectively burdening private parties "permits them to be achieved 'off-budget,' with relative invisibility and thus relative immunity from normal democratic processes." 485 U.S. at 22 (Scalia, J., dissenting). The wisdom of such schemes should be debated "during the process of taxing and spending, where both economic effects and competing priorities are more evident." *Id.* at 23; *cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (observing that "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political process can no longer be relied upon to prevent legislative abuse").

Here, it requires no great stretch of the imagination to suppose that, contrary to their acquiescence in the enactment of FETRA, the cigarette companies would have strenuously opposed funding the price support program buyout through an increase in excise taxes, which would not have triggered the offset provision in their settlement agreement with the States. Moreover, lawmakers may well have been reluctant to divert excise tax dollars – which are paid to the general treasury – from the myriad other competing programs that they and their constituents believe merit funding.

As in *Apfel*, there is no question that the purpose underlying FETRA – softening the blow to program beneficiaries who have relied on quotas and price supports for decades – is a rational and legitimate one. But the government's approach to funding the buyout is no fairer, no more just, and no more constitutional than funding the rebuilding of New Orleans after Hurricane Katrina by imposing monetary "assessments" on businesses in Grand Rapids, Michigan.

B. The Lower Court's Focus on "Retroactivity," Coupled With Its Restrictive View of the Takings Clause, Leaves a Wide and Dangerous Gap In the Fifth Amendment's Protection Against Abuses of Power

Although each of the errors discussed above would warrant this Court's attention independently, the cumulative effect of the Eleventh Circuit's two holdings makes review even more important.

In *Apfel*, the disagreement between the plurality and the concurrence with respect to the appropriate constitutional lens for examining the Coal Act, although important in its own right, was not outcome-determinative. Many of the factors that led the plurality to conclude that the Coal Act violated the Takings Clause were relevant to Justice Kennedy's Due Process analysis, 524 U.S. at 547-50 (Kennedy, J., concurring), and both opinions found these characteristics sufficient to conclude that the Coal Act violated the Fifth Amendment.

Under the Eleventh Circuit's analysis, by contrast, the consequence of concluding that the Takings Clause is not the appropriate vehicle for examining an assessment scheme almost automatically means it must be upheld (unless it happens to be "retroactive"). This leaves a gaping hole in the protection afforded by the Fifth Amendment, one that precludes meaningful scrutiny of even the prototypically unconstitutional scheme: taking from A for the purpose of giving to B. *Calder v. Bull*, 3 U.S (3 Dall.) 386, 388 (1798) (holding that it is "contrary to the great first principles of the social compact," and "against all reason and justice," to tolerate a "law that takes property from A. and gives it to B"). Because that obviously cannot be the law, something is gravely amiss.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Eleventh Circuit

No. 07-15886

SWISHER INTERNATIONAL, INC.,

Plaintiff,

v.

ED SCHAFER,
Secretary of Agriculture,

Defednant.

Argued: September 9, 2008
Decided: December 3, 2008

Before ANDERSON, BARKETT, and COX, *Circuit Judges.*

ANDRESON, *Circuit Judge*.

Swisher International, Inc. ("Swisher") appeals the district court's grant of summary judgment in favor of Edward T. Schafer, Secretary of Agriculture (the "Secretary").[1] Swisher alleged that the Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. §518 *et seq.* (the "Act") and its implementing procedures violate the Takings and Due Process Clauses of the Fifth Amendment and Swisher's constitutional right to equal protection. The Act transforms the heavily regulated and subsidized tobacco production system into a free market system. As part of the transition process, the Act provides a buyout for tobacco farmers and tobacco quota holders. The buyout is funded through quarterly assessments levied on tobacco manufacturers and importers selling tobacco products in the domestic market. Swisher believes that these assessments violate the Constitution. We have determined that the Takings Clause does not apply to Swisher's mere obligation to pay an assessment. We hold that Swisher's obligations under the Act do not violate the Due Process Clause or Swisher's equal protection rights. We affirm the district court's summary judgment in favor of the Secretary.

I. BACKGROUND

In 1938, Congress began regulating tobacco growers by establishing a system of quotas and price supports. The price support system was managed by the Commodity Credit Corporation ("CCC"). The type of tobacco used in the production of cigarettes has been the historical focus of the price support system. Swisher, as a cigar manufacturer, purchased less than one percent of its tobacco through the

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[1] Edward T. Schafer has been substituted as the appellee because he replaced former Secretary Mike Johanns, the named defendant in the district court opinion.

price support system in 1999-2004, averaging 0.031% percent of the total tobacco sold through the program in each year.

When the CCC began to sustain losses as a result of operating the program, Congress required tobacco importers, buyers, and producers to make payments to a fund that covered the losses. By the early part of this century, Congress determined that the price support system was no longer in the best interest of the industry. In 2004, the President signed into law the Fair and Equitable Tobacco Reform Act, 7 U.S.C. § 518 *et seq*. The Act dismantled the tobacco quotas and price supports that had been in place since 1938 and created a program to help tobacco farmers make the transition to a free market system. The Act works as a buyout of tobacco growers, taking place over ten years and financed by payments from tobacco manufacturers and importers.[2]

Under the Act, the Department of Agriculture determines the assessments owed by each manufacturer using a two-step process. First, the total yearly assessment is divided among six classes of tobacco manufacturers (cigarettes, cigars, snuff, roll-your-own, chewing tobacco, and pipe tobacco), based on their market share in the preceding calendar year quarter. 7 U.S.C. §518d(b)(1), (e)(1). The percentage of the total yearly assessment for which each class is responsible was statutorily established for fiscal year 2005, but the Secretary has the authority to adjust the percentages in subsequent years. *Id.* §518d(c)(1)-(2). The market share for each class is determined by multiplying each class's tobacco volume by the excise taxes paid by that class in the prior year. 7 C.F.R. §§1463.3, 1463.4. For all classes of tobacco except cigars, the actual excise tax rates are used to calculate market share. *Id.* §1463.7(c). Because the excise tax rate for cigars varies,

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[2] The Act also relieves cigarette manufacturers of some of their liability under a settlement agreement with 47 state attorneys general regarding recovery of health care costs related to smoking. The settlement agreement provided that settlement payments would be cancelled on a dollar-for-dollar basis if the federal government enacted an industry-funded tobacco grower buyout.

the market share for cigar manufacturers is calculated using the maximum excise tax rate and the number of units sold. Determination of the market share of each tobacco class is referred to as "Step A."

Once the market share for each class has been determined, the Secretary allocates the percentage of the total assessment owed by each class among individual manufacturers and importers. 7 C.F.R. §1463.7(d). For cigarette and cigar sellers, the individual assessments are determined by the number of cigarettes and cigars sold. 7 U.S.C. §518d(g)(3)(A). For the remaining classes of tobacco products, the number of pounds of tobacco is used to determine the assessments. *Id.* §518d(g)(3)(B). This determination is referred to as "Step B."

Swisher paid $11 million in the first year of the program. Swisher anticipates its total assessments over the ten years will be in excess of $100 million. In 2005, Swisher filed suit against the Department of Agriculture, challenging the constitutionality of the Act. The district court granted summary judgment in favor of the Secretary, and Swisher now appeals.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 836 (11th Cir. 2006). Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of fact and compels judgment as a matter of law. Fed. R. Civ. P. 56(c); *Holloman*, 443 F.3d at 836.

III. DISCUSSION

Both parties rely upon *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998). We agree that *Eastern*

Enterprises and its progeny provide significant guidance for this case. Thus, we first analyze that case to arrive at a rule of decision for this case. Then we determine whether Swisher's rights were violated under the Due Process Clause of the Fifth Amendment. Finally, we determine whether the methodology for apportioning the assessments violates Swisher's equal protection rights under the Fifth Amendment.

A. Analysis of Eastern Enterprises and Determination of a Rule of Decision for this Case

In *Eastern Enterprises*, the Supreme Court considered challenges to the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act") under the Due Process and Takings Clauses of the Constitution. 524 U.S. at 503-04, 118 S. Ct. at 2137 (plurality opinion). The Coal Act assigned retirees to previous employers according to a statutory formula, requiring the employers to pay premiums into the Combined Fund to cover benefits for the retirees. *Id.* at 514-15, 118 S. Ct. at 2141- 42. By 1965, Eastern had transferred all of its coal-related operations to a subsidiary and was no longer involved in the industry. *Id.* at 516, 118 S. Ct. at 2143. Following the Coal Act's enactment, Eastern was assigned the obligation for premiums regarding over 1,000 retired miners who had worked for the company before 1966, with the premiums for a 12-month period exceeding $5 million. *Id.* at 517, 118 S. Ct. at 2134. Eastern asserted that the Coal Act violated substantive due process and constituted a taking of its property. *Id.*

1. Justice O'Connor's plurality opinion concluded that application of the Coal Act to Eastern violated the Takings Clause

The plurality applied the Takings Clause and concluded "that the Coal Act's allocation of liability to Eastern violates the Takings Clause, and . . . should be enjoined as applied to

Eastern." *Id.* at 538, 188 S. Ct. at 2153. The case did not involve a classic taking in which private property is taken by the government for its own use. *Id.* at 522, 118 S. Ct. at 2146. Although not the traditional takings model, the plurality asserted that economic regulation such as the Coal Act can amount to a taking. *Id.* at 522-23, 118 S. Ct. at 2146. The party challenging a governmental action as a taking has a heavy burden because government regulations often curtail some use of private property, and not every destruction of property is a taking in the constitutional sense. *Id.* at 523, 118 S. Ct. at 2146.

"[T]he process for evaluating a regulation's constitutionality involves an examination of the 'justice and fairness' of the governmental action." *Id.* The inquiry is essentially ad hoc and fact intensive, and the Court has found three factors to have particular significance: "[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* at 523-24, 118 S. Ct. at 2146 (alteration in original). The plurality noted that its prior decisions give Congress a lot of leeway to create economic legislation, including the power to impact contracts between parties and to impose a certain degree of retroactive legislation. *Id.* at 528, 118 S. Ct. at 2149. However, the plurality stated that its decisions "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience." *Id.* at 528-29, 118 S. Ct. at 2149.

The plurality determined—by applying the three factor test used in regulatory takings analysis—that the Coal Act's allocation scheme, as applied to Eastern, constituted a taking. *Id.* at 529, 118 S. Ct. at 2149. In discussing the first factor, economic impact, the plurality concluded that there was no doubt that the Coal Act placed a significant financial burden on Eastern. *Id.* Eastern's cumulative payments under the Coal

Act were estimated to be between $50 and $100 million. *Id.* The plurality indicated "that an employer's statutory liability for multiemployer plan benefits should reflect some proportion[ality] to its experience with the plan." *Id.* at 530, 118 S. Ct. at 2149 (alteration in original) (internal quotations omitted). Eastern's liability under the Coal Act was based solely on its previous employees from 30 to 50 years before the enactment of the Act, "without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted." *Id.* at 531, 118 S. Ct. at 2150.

With respect to the second factor, the plurality determined that "the Coal Act substantially interfere[d] with Eastern's reasonable investment-backed expectations." *Id.* at 532, 118 S. Ct. at 2151. "Retroactivity is generally disfavored in the law . . . ." *Id.* The legislation reached back between 30 to 50 years to impose liability on Eastern based on prior actions. *Id.* Although the Act only mandated the payment of future benefits, it attached new liability based on an employment relationship that had terminated long before the Act's enactment. *Id.* Retroactive legislation brings up "fundamental notions of justice" and issues of fairness "because it can deprive citizens of legitimate expectations and upset settled transactions." *Id.* at 532-33, 118 S. Ct. at 2151. The Coal Act's retroactive liability is particularly far-reaching, "divesting Eastern of property long after the company believed its liabilities under" its prior agreement had been settled. *Id.* at 534, 118 S. Ct. at 2152. Substantial questions of fairness are raised by reaching so far into the past to impose liability. *Id.* Although Congress' attempt to protect miners was noble, "the Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern." *Id.* at 536, 118 S. Ct. at 2153.

Regarding the third factor, the plurality determined that "the nature of the governmental action in this case [was] quite unusual." *Id.* at 537, 118 S. Ct. at 2153. Congress sought to find a legislative remedy to the major problem of funding for

miners' benefits; however, the solution singled out Eastern based on its conduct far in the past, and without any relationship to any commitment made by the employers or any injury Eastern caused. *Id.* The governmental action was problematic in regards to "fundamental principles of fairness underlying the Takings Clause." *Id.* The plurality concluded that, under the specific facts of the case, application of the Coal Act to Eastern was an unconstitutional taking. *Id.* The plurality acknowledged that there was a correlation between the analysis under the Takings and Due Process Clauses, but O'Connor noted the Court's "concerns about using the Due Process Clause to invalidate economic legislation." *Id.*

2. Justice Kennedy's concurrence concluded that application of the Coal Act to Eastern was unconstitutional under the Due Process Clause

Justice Kennedy concurred in the judgment. *Id.* at 538, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part). However, Justice Kennedy argued that the plurality was wrong to conclude that the Coal Act took property because the regulation was without regard to property. *Id.* at 540, 118 S. Ct. at 2154. The Coal Act did not operate on or alter an identified property interest, and it was not measured by property interests. *Id.* "The law simply imposes an obligation to perform an act, the payment of benefits," and to the extent that the regulation affects property interests, it is similar to many laws that have never before been considered takings. *Id.* Kennedy reasoned that, because "the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* at 545, 118 S. Ct. at 2157 (citation omitted).

Justice Kennedy concluded that principles forbidding retroactive legislation were sufficient to show that there was a

violation of the Due Process Clause. *Id.* at 547, 118 S. Ct. at 2158. Although the Court has been hesitant to subject economic legislation to due process analysis, the Court has been willing to look more closely with regard to retroactive legislation. *Id.*

Due process analysis requires an inquiry into whether the legislature acted in an arbitrary and irrational way in enacting the retroactive law. *Id.* Although prospective legislation carries a presumption of constitutionality, that does not mean that Congress can automatically legislate retroactively that which it could have legislated prospectively. *Id.* at 547-48, 118 S. Ct. at 2158. "Both stability of investment and confidence in the constitutional system . . . are secured by due process restrictions against severe retroactive legislation." *Id.* at 549, 118 S. Ct. at 2159.

Justice Kennedy concluded that the case represented "one of the rare instances where the Legislature . . . exceeded the limits imposed by due process." *Id.* The remedy in the Coal Act, as applied to Eastern, "bears no legitimate relation to the interest which the Government asserts in support of the statute." *Id.* The unprecedented scope of retroactivity was a significant determinant in the unconstitutionality of the statute. *Id.* Liability of former employers has been upheld when the statutes were remedial, but this statute was not remedial because Eastern was not responsible for the expectation of lifetime health benefits for retired miners. *Id.* at 550, 118 S. Ct. at 2159. The expectation of lifetime benefits was created by agreements made long after Eastern had left the coal business. *Id.* This case represented the rare instance in which the severe retroactive application of legislation is so egregious as to violate the due process clause. *Id.*[3]

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[3] The four dissenters agreed with Justice Kennedy that due process, rather than takings, was the appropriate framework for analysis. They held: "The Constitution's Takings Clause does not apply." *Id.* at 554, 118 S. Ct. at 2161 (Breyer, J., dissenting). This is so, according to the dissent, because the Takings Clause is primarily concerned not with "preventing arbitrary

3. Is either the plurality opinion or Justice Kennedy's concurrence controlling?

As indicated above, the decision in *Eastern Enterprises* constitutes a fragmented decision in which the five Justices concurring in the judgment did not agree upon a single rationale to explain the result. In such a case, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977).

We note that the Supreme Court has commented that the *Marks* inquiry "has so obviously baffled and divided the lower courts." *Nichols v. United States*, 511 U.S. 738, 746, 114 S. Ct. 1921, 1927 (1994); *see also Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 2337 (2003). Courts of appeal have applied several different formulations of the *Marks* rule. Although this Court has recently applied one particular formulation, *United States v. Robison*, 505 F.3d 1208, 1219-22 (11th Cir. 2007),[4] we need not in this ca 4 se apply any particular formulation. This is so because Justice O'Connor's opinion for the plurality in *Eastern Enterprises*

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or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.*

[4] In *Robison*, we addressed the "narrowest ground" of the five Justice majority opinion in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208 (2006). The issue in *Rapanos* and *Robison* involved the definition of "navigable waters" which in turn determined the jurisdiction of the Clean Water Act. We held that the narrowest ground was the least farreaching: "The issue becomes whether the definition of 'navigable waters' in the plurality or concurring opinions in *Rapanos* was less far-reaching (i.e., less restrictive of CWA jurisdiction)." *Robison*, 505 F.3d at 1221. Because Justice Kennedy's test would "classify a water as 'navigable' more frequently than Justice Scalia's test," we determined that Justice Kennedy's test constituted the "narrowest grounds," the one less restrictive of the application of the federal statute, and thus constituted the binding rule of decision for *Robison*. *Id.* at 1221-22.

would not constitute binding authority (i.e., would not constitute the narrower ground) under any of the several formulations of the *Marks* inquiry.[5] We need not decide

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[5] Under the formulation applied in *Robison*, it is probable that Justice Kennedy's concurring opinion in *Eastern Enterprises*, and not Justice O'Connor's plurality opinion, would be considered the narrower of the two standards. It is probable that his standard would be less far-reaching, i.e., less restrictive of the application of the federal Coal Act legislation. In other words, especially in light of the extremely high threshold that courts require before finding a substantive due process violation, it is probable that Justice Kennedy's standard would less frequently result in a conclusion that the Coal Act was unconstitutionally applied. See Eastern Enterprises, 524 U.S. at 542, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part) (noting that the plurality's opinion "would expand an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause. . . . The plurality opinion would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts."). Whether or not Justice Kennedy's concurrence is the narrower ground under the *Robison* formulation, a matter that we need not and do not decide in this case, we are confident that Justice O'Connor's plurality opinion is not the narrower ground, and thus is not binding precedent.

Other courts of appeal have held that neither Justice O'Connor's plurality opinion nor Justice Kennedy's concurrence are binding, because neither can meaningfully be regarded as "narrower" than the other, neither opinion being a logical subset of the other. Thus no common denominator can be said to exist commanding the support of five Justices concurring in the judgment. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Anker Energy Corp. v. Consol. Coal Co.*, 177 F.3d 161, 169-70 (3d Cir. 1999); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Under these cases, neither opinion is binding, and thus under this formulation, Justice O'Connor's plurality opinion would of course not be binding.

Other courts of appeal have indicated that they are bound to follow the five Justices in *Eastern Enterprises* who concluded that the takings analysis was not appropriate; therefore, those courts applied substantive due process. Those courts of appeal rely upon the fact that Justice Kennedy and the four dissenting Justices all indicated that a takings analysis was not appropriate. *See Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc); *Parella v. Ret. Bd.*

whether Justice Kennedy's concurrence constitutes the narrower ground, because we can assume *arguendo* that neither opinion constitutes the narrower ground, thus leaving us without binding authority, and leaving us with the obligation to independently evaluate the case law and determine for ourselves which approach is more consistent with the case law and more plausible. As elaborated below, our independent evaluation leads us to conclude that the takings analysis is not appropriate for this case.

Our independent evaluation of the case law leads us to agree with Justice Kennedy that the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money. In the Supreme Court case, Eastern Enterprises challenged the power of Congress to require that it contribute to the funding of heath care benefits for retirees in the coal industry, a mere obligation to pay money. Similarly, in the instant case, Swisher challenges the power of Congress to impose upon it assessments under the Fair and Equitable Tobacco Reform Act as a contribution toward the funding of the buyout of tobacco growers and the transition to the free market system – again a mere obligation to pay money. As Justice Kennedy pointed out, such an obligation

> does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank

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of R.I. Employees' Ret. Sys., 173 F.3d 46, 58 (1st Cir. 1999). Of course, this latter formulation is inappropriate in this circuit, the law of our circuit being clear that a combination of five Justices, some in the majority and some in the dissent, does not constitute binding precedent. *See Robison*, 505 F.3d at 1221. In any event, under none of the foregoing formulations would Justice O'Connor's plurality opinion in *Eastern Enterprises* constitute binding precedent.

> account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Eastern Enterprises, 524 U.S. at 540, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part).[6]

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[6] In support of its position that the takings analysis is appropriate, Swisher relies upon *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S. Ct. 1925 (1998), *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446 (1980), and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S. Ct. 1018 (1986). *Phillips* and *Beckwith* are readily distinguishable. Both involve specific, identifiable, property interests which were invaded by the governmental action. *Phillips* involved the appropriation by the state of Texas of the interest earned on IOLTA accounts (Interest on Lawyers Trust Account). 524 U.S. at 159-60, 118 S. Ct. 1927-28. Under that program in Texas, and other states, certain client funds held by an attorney were deposited in bank accounts, and the statute provided that the interest generated by such funds was to be paid to a foundation to finance legal services for lower income individuals. *Id.* at 160, 118 S. Ct. at 1928. Similarly, in *Beckwith*, the state statute provided that the clerk of each county court should invest funds deposited in the registry of the court (e.g., in interpleader cases) in interest bearing bank accounts and that all interest accruing from such monies shall be deemed the income of the office of the clerk. 449 U.S. at 156 n.1, 101 S. Ct. at 448 n.1. Thus, both *Phillips* and *Beckwith* involved an invasion of specific identifiable property. In *Connolly*, appellants brought a Takings Clause challenge to a provision of the Multiemployer Pension Plan Amendments Act of 1980 which required an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's unfunded vested benefits. 475 U.S. at 221-23, 106 S. Ct. at 1024-25. Although appellants did not emphasize their property interest, the case did involve at least the semblance of a property interest. Prior to the enactment of the statute, an employer's sole obligation to the pension trust was to pay a fixed contribution required by the collective bargaining agreement. *Id.* at 218, 106 S. Ct. at 1022. The agreement clearly stated that the employer's obligation for pension benefits was ended when the employer paid the specified contribution. *Id.* Thus, *Connolly* is distinguished from the instant case in that there is no semblance of a property interest involved in this case. Moreover, the takings analysis conducted by the Supreme Court in *Connolly* merely reinforced the Court's belief "that the imposition of withdrawal liability does not

Swisher's argument in this case challenges the very power of Congress to impose the obligation at issue upon Swisher. In other words, Swisher asserts "a substantive or absolute limit on the government's power to act." *Id.* at 545, 118 S. Ct. at 2157. As Justice Kennedy points out, the Takings Clause, by its plain language, does not operate as a substantive or absolute limit on the government's power; rather, it operates only as a conditional limitation, permitting the taking so long as the government pays just compensation. As the Supreme Court stated in 1987:

> As its language indicates, and as the Court has frequently noted, this provision [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15, 107 S. Ct. 2378, 2385-86 (1987) (citations omitted).

In addition to the plain language of the Takings Clause, the case law following *Eastern Enterprises* supports the proposition that the takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest. In *Givens v. Alabama Department of Corrections*, 381 F.3d 1064 (11th Cir. 2004), we held that an Alabama inmate had no private property interest in the interest earned on the monies deposited in a bank account in the inmate's name into which earnings of the inmate pursuant to the work-release program were deposited. *Id.* at 1070. Because "no recognized property interest is implicated here, . . . there is no

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constitute a compensable taking under the Fifth Amendment." *Id.* at 225, 106 S. Ct. at 1026.

'taking.'" *Id.* Similarly, in the post-*Eastern Enterprises* cases construing the Coal Act, and in analogous contexts, several circuit courts of appeals have applied a substantive due process analysis, rather than a takings analysis.[7] Moreover,

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[7] *See Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) ("[W]e believe that due process analysis encompasses the relevant concerns."); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001) (en banc) (holding that a congressional imposition of an obligation to pay money does not constitute an unconstitutional taking of property, in a case challenging the special monetary assessments on domestic utilities for remediation of environmentally contaminated uranium processing facilities, the court rejected a Takings Clause challenge to the Energy Policy Act of 1992, citing *Eastern Enterprises* as well as previous Federal Circuit precedent); *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (holding, in the context of a Takings Clause challenge to a Rhode Island statute capping annual pension benefits of retired legislators, that plaintiffs must prove the deprivation of a property right to support a Takings Clause claim, relying upon *Eastern Enterprises* and previous First Circuit cases).

However, other post-*Eastern Enterprises* cases construing the Coal Act have analyzed the claim employing both a Takings Clause analysis and a substantive due process analysis. Those cases have held that neither Justice O'Connor's opinion nor Justice Kennedy's constitutes binding precedent, and that the only binding aspect of the splintered decision is its specific result. See *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *see also Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Incidentally, all of the post-*Eastern Enterprises* cases construing the Coal Act have upheld the statute as applied to the parties challenging same. *See Bituminous Contractors*, 156 F.3d at 1257 ("The clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements [which agreements first gave rise to the reasonable expectation of lifetime benefits] represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability . . . .").

On the other hand, the Fifth Circuit in *United States Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412 (5th Cir. 2000), did find a violation of the Takings Clause where a Louisiana statute imposed severe retroactive liability on a class of insurers who had withdrawn from (or substantially reduced their participation in) the Louisiana market prior to

that the takings analysis is not appropriate in this case is supported by persuasive authority. Five Supreme Court Justices have expressed the view that the Takings Clause does not apply where there is a mere general liability (i.e., no separately identifiable fund of money) and where the challenge seeks to invalidate the statute rather than merely seeking compensation for an otherwise proper taking. *Eastern Enterprises*, 524 U.S. at 539-47, 118 S. Ct. at 2154-58 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-56, 118 S. Ct. at 2161-63 (Breyer, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting).[8]

Accordingly, we conclude that it would be inappropriate in this case to apply a takings analysis.[9] This leaves only Swisher's substantive due process challenge.

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the passage of the statute. However, the Fifth Circuit decision is not inconsistent with our decision today. The Fifth Circuit noted that Justice Kennedy declined to apply a takings analysis because there was no identifiable property interest at issue in *Eastern Enterprises*. *Id.* at 420. Because *McKeithen* did involve an identifiable property interest, the Fifth Circuit concluded that Justice Kennedy's concern about the applicability of a takings analysis was moot in the Fifth Circuit case. *Id.* Moreover, the Fifth Circuit concluded that Justice Kennedy's reasoning was otherwise in harmony with that of Justice O'Connor's plurality opinion in *Eastern Enterprises*. *Id.*

[8] We have held that there is no binding precedent when five Justices have expressed a common view, when some are in the majority and some are in the dissent. *Robison*, 505 F.3d at 1221. Although not binding precedent, the common view of five Justices obviously carries persuasive authorities.

[9] Indeed, to apply a Takings Clause analysis in the instant case would constitute an even greater expansion of takings jurisprudence than Justice O'Connor's plurality opinion in *Eastern Enterprises*. There, at least there was some semblance of a property interest involved. The collective bargaining agreement which Eastern did sign in 1950 provided for a fixed 30- cents-per-ton royalty on coal produced as the contribution to be made by signatory operators. *Eastern Enterprises*, 524 U.S. at 506, 118 S. Ct. at 2138 (plurality opinion). Moreover, the contractual obligation to contribute expired with the expiration of the particular collective bargaining agreement. Thus, in *Eastern Enterprises*, the statutory

B. Whether the Obligation to Pay Assessments under the Act Violates Swisher's Due Process Rights

Having determined that a takings analysis is not appropriate in this case, we turn to Swisher's argument that the Act violates its right to due process because it imposes retroactive liability that is disproportionate to Swisher's participation in the price support program. Economic legislation "come[s] to the Court with a presumption of constitutionality." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976). To prove that a statute violates its due process rights, the aggrieved party must demonstrate that the legislature has acted arbitrarily and irrationally. *Id.* at 15, 96 S. Ct. at 2892. However, if the government can show that the statute has a "legitimate legislative purpose furthered by rational means," due process is satisfied. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 1112 (1992). When a statute has a retroactive effect, the government must also prove that the statute's retroactive application furthers a legitimate legislative purpose. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718 (1984).

As is apparent from our discussion above summarizing Justice Kennedy's substantive due process analysis in *Eastern Enterprises*, the primary factor which led to the holding that the Coal Act was unconstitutional was the fact that the Coal Act imposed upon Eastern Enterprises a retroactive obligation "of unprecedented scope." 524 U.S. at 549, 118 S. Ct. at 2159. The crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon Swisher in the instant case is not retroactive. The Act provides:

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assessment might well have been deemed to have been inconsistent with Eastern's contractual obligation, and an impairment of its property interest in that contract. By contrast, in the instant case, there is no semblance of a property interest; there is no contract limiting Swisher's obligations.

> The Secretary, acting through the Commodity Credit Corporation, shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

7 U.S.C. § 518d(b)(1). Under the plain meaning of the language of the statute, *every* tobacco manufacturer and importer currently participating in the domestic tobacco market is subject to the assessments. Accordingly, a new manufacturer or importer would be subject to an assessment under the statute as a cost of doing business in the industry. Contrary to Swisher's argument, the plain language of the statute clearly indicates that the assessments are not based upon the past conduct of tobacco manufacturers or importers.[10] Quite the contrary, the assessment is based upon current participation in the market, such that new entrants are assessed, as well as those who participated in the past.

Stripped of its argument that the Act is retroactive, Swisher's due process challenge is readily disposed of as being wholly without merit. We note again that congressional legislation "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Turner Elkhorn*, 428 U.S. at 15, 96 S. Ct. at 2892. "Statutes may be invalidated on due process grounds only under the most egregious of circumstances." *Eastern Enterprises*, 524 U.S. at 550, 118 S. Ct. at 2159 (Kennedy, J., concurring in the judgment and dissenting in

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[10] It is true that a person must "demonstrate to the satisfaction of the Secretary that the person is a tobacco quota holder" in order to be eligible to receive a contract payment under the statute. 7 U.S.C. § 518a(b). However, the fact that recipients of the payments must show they were quota holders does not imply that the obligation to pay assessments is based on past participation in the quota system.

part). So long as congressional legislation "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *R.A. Gray*, 467 U.S. at 729, 104 S. Ct. at 2717-18.

Applying that deferential standard, we readily conclude that the Act easily passes constitutional muster. The legitimate legislative purpose is apparent. Congress obviously perceived problems in the industry, perceived a need to eliminate the old subsidy system, and decided to move to a free market system. However, Congress recognized that tobacco farmers and quota holders should be provided some cushion for the transition. Seeing these economic problems in the industry, Congress exercised its legitimate legislative powers to address same. We also readily conclude that the means Congress chose to address these industry problems were rational. Congress recognized that such a transition to a free market system would benefit all current and future tobacco manufacturers and importers, and thus devised a system of assessments to fund the transition to the free market system – i.e., assessing all current tobacco manufacturers and importers, all of whom would benefit from the transition to the free market system. Moreover, tobacco manufacturers and importers currently engaged in the domestic market are entities that are not only likely to benefit from the deregulation, but also are entities best suited to pass such increased costs along to the ultimate consumers.[11]

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[11] Incidentally, the system advocated by Swisher might have placed a competitive burden upon the kind of tobacco that was previously subsidized by confining the assessments only to those sellers of tobacco products who previously purchased subsidized tobacco. By contrast, the system adopted by Congress places upon domestic tobacco producers no such adverse competitive burden. Rather, the statute spreads the burden of the assessments amongst all sellers of tobacco products in the domestic market (or more probably spreads such burden amongst all consumers of such tobacco products because the sellers will probably pass the burden through to the ultimate consumers).

We conclude that Congress exercised its powers to serve legitimate legislative purposes. We also conclude that Congress chose rational means. Thus, we conclude that Swisher has failed to show that the Act is arbitrary and irrational, and has failed to demonstrate that the Act is unconstitutional as applied to Swisher.[12]

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[12] Although we decided above that a takings analysis would not be appropriate in this case, a close analysis of the rationale of Justice O'Connor's plurality opinion in *Eastern Enterprises* and Justice Kennedy's concurrence reveals that the rationale employed in the two opinions is strikingly similar. It is true that Justice O'Connor's rationale proceeded under the framework of the three factors of particular significance in regulatory takings: economic impact; interference with reasonable investment backed expectations; and the character of the governmental action. However, the factors she considered under that framework were virtually identical to the factors considered by Justice Kennedy under the due process framework. In both opinions, the crucial factor was the retroactivity of unprecedented scope. Both opinions focused on the fact that the new statutory obligations bore no relationship to Eastern's participation in the 1947 and 1950 agreements which predated the creation of any reasonable expectation on the part of employees of lifetime benefits. Indeed, Justice O'Connor acknowledges that the "analysis of legislation under the Takings and Due Process Clauses is correlated to some extent." *Eastern Enterprises*, 524 U.S. at 537, 118 S. Ct. at 2153 (plurality opinion). Similarly, Justice Kennedy notes: "[I]t is no accident that the primary retroactivity precedents upon which today's plurality opinion relies in its takings analysis were grounded in due process." *Id.* at 548, 118 S. Ct. at 2158 (Kennedy, J., concurring in the judgment and dissenting in part). Because the rationale underpinning the two analyses is so similar, we strongly suspect that we would reach the same result should we undertake the takings analysis described in Justice O'Connor's opinion for the plurality in *Eastern Enterprises*.

For example, Swisher complains vigorously that the imposition of the instant assessment on it is out of proportion to its experience with the prior subsidy programs. The flaw in Swisher's argument is that, unlike the situation in *Eastern Enterprises*, the assessments in the instant case are not based upon prior participation in the former subsidy programs. Quite the contrary, the assessments imposed by this Act are expressly based upon an entity's participation in the *current* domestic market for tobacco products. In other words, the assessments in the instant case are not retroactive at all.

C. Whether the Act Violates Swisher's Equal Protection Rights

Swisher also argues that the Act's methodology for allocating the assessments violates Swisher's equal protection rights.[13] This argument is without merit because the Act is economic legislation and Swisher is not a member of a suspect class. "[E]qual protection is not a license for the courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 2101 (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification." *Id.* (emphasis added). The rational basis test demonstrates "the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one," and perfection is not required in making the necessary classifications. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 2567 (1976).

Swisher contends that its equal protection rights are violated under Step A of the assessment determination because the maximum excise tax rate on cigars is used in determining the market share for the cigar industry, whereas the actual excise rate is used to determine the market share for cigarettes and other tobacco products. There is certainly a rational basis for choosing a unitary rate rather than the actual excise rate because "large cigars" are the only class of tobacco products that have a variable excise tax rate based on

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[13] The Equal Protection Clause of the Fourteenth Amendment does not apply directly to the federal government; however, the principles of equal protection are applied to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498-500, 74 S. Ct. 693, 694-95 (1954).

the price of the cigar. *See* 26 U.S.C. § 5701(a)(2). We readily conclude that it was not irrational for the Secretary to determine that it would be administratively convenient to choose one tax rate for calculating the market share for cigar manufacturers. Although the total share may not be perfectly equal, the methodology the Secretary uses meets the rational basis test.

Swisher also contends that its equal protection rights are violated under Step B because Swisher's intra-class share is determined by the number of cigars sold without any difference based on the cost or size of the cigar, and Swisher primarily produces less expensive, small cigars. Although the distribution of the intra-class share may not be perfect, choosing to allocate the assessment owed by each cigar manufacturer based on the number of cigars sold easily satisfies the highly deferential rational basis test. We readily conclude that it was not irrational for the Secretary to determine that basing this calculation on the volume of cigars sold would be administratively convenient.

Because there was a rational basis for the Act's methodology, we reject Swisher's equal protection challenge.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the Secretary.

AFFIRMED.

COX, Circuit judge, specially concurring:
I concur in the judgment. I agree that the Act does not violate the Takings Clause. I also concur in sections III.B. and III.C. of the opinion, holding that Swisher's due process and equal protection rights are not violated by the obligations the Act imposes on Swisher.

[Pages 24a-32a left blank intentionally]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SWISHER INTERNATIONAL, INC.,

Plaintiff, No. 3:05-cv-871-J16-TEM

v.

MIKE JOHANNS,
Secretary of Agriculture,

Defendant.

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Before the Court are Defendant, Mike Johanns, the Secretary of the United States Department of Agriculture's Motion for Summary Judgment (the "Motion") (Dkt. 24), with incorporated Memorandum of Law and supporting affidavits. Plaintiff, Swisher International Incorporated ("Swisher") filed a Response and Cross Motion for Summary Judgment (the "Cross Motion") (Dkt. 34) with the parties' Stipulated Facts (Ex. 1) and supporting affidavits.[1] Also before the Court are Swisher's Reply (the "Reply") (Dkt. 35) and the

[1] Hereinafter Mike Johanns will be referred to as the "Secretary" and the Department of Agriculture shall be referred to as either the "Department" or "USDA."

Secretary's Reply to Response (the "Response") (Dkt. 37). The Court granted Swisher's Request for Oral Argument. (Dkt. 38). A transcript of that proceeding is on file with the Court. (Dkt. 43).[2]

I. Procedural Background

After exhausting its administrative remedies,[3] Swisher filed a four-count complaint (the "Complaint") (Dkt. 1) against the Secretary in his capacity as head of the Department on September 13, 2005.

II. Factual Background

Swisher, a Delaware corporation with principal operations located in Jacksonville, Florida, manufactures small and large cigars and some smokeless tobacco products. (Dkt. 34, Ex. 1, ¶ 2). Swisher alleges that regulations implementing the assessment provisions of the Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. §§ 518 *et seq.* ("FETRA") are inconsistent with FETRA, in violation of the Administrative Procedure Act (the "APA"). Swisher further alleges that FETRA and its implementing regulations violate the Takings and

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[2] References to that transcript will be designated as Dkt. 43 at p.__.

[3] On June 23, 2005, pursuant to Department regulations, Swisher paid its assessments under the Fair and Equitable Tobacco Reform Act of 2004, which were levied for the first two quarters of fiscal year 2005. Swisher also filed objections regarding the impropriety of the assessments. On July 12, 2005, the Department sent Swisher a letter rejecting Swisher's objections. The letter informed Swisher that the administrative appeals process could not be used to "challenge statutory or regulatory provisions or any mathematical formula or other procedure or policy that is generally applicable to all similarly situated participants." (Dkt. 1, ¶ 89).

Due Process Clauses of the Fifth Amendment and principles of Equal Protection.

FETRA comprises part of the American Jobs Creation Act of 2004, which was signed into law by the President on October 22, 2004.[4] *Pub. L.* 108-357. FETRA repealed the tobacco marketing quota and related price support programs authorized by Title III of the Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949, transforming tobacco production into a free market system at the end of the 2004 crop year.[5]

In order to assist with the transition from the highly regulated market to the free market, FETRA provides for a "buyout" of tobacco farmers and tobacco quota holders (the "producers") based on their historic quota levels. The buyout, titled the Tobacco Transition Payment Program ("TTPP"), is annualized and paid over ten (10) years. It is projected to cost $9.6 billion and is funded through quarterly assessments on tobacco product manufacturers and importers (the "manufacturers") imposed by the Secretary through the Department's Commodity Credit Corporation ("CCC"). The CCC deposits the quarterly assessments made under the TTPP into a revolving trust fund, the Tobacco Trust Fund (the "TTF"), which Congress created specifically to carry out the Act's purposes. 7 U.S.C. § 518(e)(a).[6]

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[4] Sections 611-613 of the American Jobs Creation Act of 2004, codified at 7 U.S.C. § 518 (West 2005).

[5] Under the now repealed tobacco quota program, the price and supply of tobacco grown and sold in the United States was regulated.

[6] The CCC's authority to make assessments under FETRA "terminates on September 30, 2014," 7 U.S.C. § 518(d)(k), and FETRA limits the trust fund expenditures to $10,140,000,000. 7 U.S.C. § 518(f).

Under FETRA there is a two-step process to determine a manufacturer's quarterly assessment. First, the overall amount needed to make transition payments to producers is allocated among the six classes of tobacco set out in FETRA, i.e., cigarettes, cigars, snuff, roll-your-own, chewing and pipe ("Step A"). 7 U.S.C. § 518(c)(1). Second, within each class, the amount required to be paid by each manufacturer is allocated on a *pro rata* basis based upon each manufacturer's share of gross domestic volume as calculated under the statute ("Step B"). 7 U.S.C. § 518(e).

By statute, the assessments began in fiscal year ("FY") 2005 and conclude in FY 2014. 7 U.S.C. § 518d(b)(1). For FY 2005, FETRA established the Step A allocation. 7 U.S.C. § 518(c)(1). For the ensuing FYs, the Secretary is directed to "periodically adjust the percentage . . . to be assessed against . . . the [manufacturers] of each class of tobacco product . . . to reflect changes in the share of gross domestic product volume held by that class of tobacco product." 7 U.S.C. § 518d(c)(2). For Step B determinations, the shares payable by the cigar and cigarette classes are based on the gross domestic volume as measured by the number of cigarettes and cigars "removed from bond" and placed in domestic commerce. 7 U.S.C. § 518d(e)(1). To determine the final assessment for each manufacturer within a certain class its Step B figure is multiplied by the assessment amount assigned to the relevant class under the Step A process. 7 U.S.C. § 518d(f). *See also* the Johnson. Decl., Dkt. 24, Ex.1, ¶ 11.

Pursuant to FETRA, the CCC issued regulations governing the process for assessing manufacturers. *See* 7 C.F.R. §§ 1463.1 *et seq*. Those regulations, titled the

Tobacco Transition Program, are codified at 7 C.F.R. §§ 1463.1-1463.201.[7]

Under the implementing regulations, CCC makes an annual determination of the national assessment, which is then "split up" on a class wide basis (Step A) based on the CCC's determination of each class's share of total excise taxes paid on tobacco products under 26 U.S.C. § 5701 in a manner that complies with FETRA. 7 C.F.R. §§ 1463.4, 1463.5. For large cigars, the excise tax rate varies, subject to a statutory cap. To determine relative market share, the Department uses the maximum excise tax rate assigned. For all other tobacco types, the Department determines each tobacco class's relative market share using actual excise tax rates. Following that, each class's assessment is further divided among the individual manufacturers (Step B) based on domestic market share as determined under FETRA, and the total assessments are calculated. 7 C.F.R. §§ 1463.7.

Each entity's Step B percentage of the class's portion of the assessment is calculated using the relevant volume for the manufacturer. Excise taxes for products other than cigars and cigarettes are calculated based on weight. For cigars and cigarettes, FETRA requires the CCC to rely on the number of units removed to determine each company's Step B share of the class assessment. Therefore, volumes for cigarettes and cigars are reported on a "per stick" rather than a weight basis.

In summary, under FETRA regulations, each manufacturer is assessed an amount based on (1) the total amount of money needed that quarter to fund the TTPP; (2) the percentage of the total assigned to that company's

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[7] FETRA required that the regulations be promulgated without regard to the notice and comment provisions of 5 U.S.C. § 553. 7 U.S.C. § 642(b).

class of tobacco products, and (3) that company's share of the total volume of domestic sales for that class based on volume, as measured either on a pound or stick basis. As of the filing of the Motion, Swisher has paid over $11 million dollars in FY 2005 in FETRA assessments. Admin. Rec. at 676.[8]

III. Applicable Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact [such] that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987); *Edwards v. Acadia Realty Trust*, Inc., 141 F. Supp. 2d 1340, 1344-45 (M.D. Fla. 2001). The Court will construe the record and all inferences that can be drawn from it in the light most favorable to the nonmoving party, and the moving party bears the initial burden of establishing the absence of a genuine material fact. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). Once this burden is met, however, the opposing party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.'" *Celotex Corp.*, 477

[8] Swisher claims that over the ten-year period of FETRA, Swisher is likely to have to pay in excess of $100 million dollars. (Dkt. 34 at p. 7). Although, as will be demonstrated below, this figure is not statutorily "set in stone."

U.S. at 342. The Eleventh Circuit explained in *Samples* that the opposing party need only present evidence from which a jury might return a verdict in its favor in order to survive the moving party's motion for summary judgment. *See Samples*, 846 F.2d at 1330; *see also Augusta Iron & Steel Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988).

Notably, the Supreme Court pointed out in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), that the moving party's burden only extends to facts that might affect the outcome of the lawsuit under the governing law, as "[f]actual disputes that are irrelevant or unnecessary will not be counted." Summary judgment will only be granted if all facts and inferences point overwhelmingly in favor of the moving party, such that a responsible jury could not find in favor of the opposing party. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). If there is conflicting evidence that will permit differing reasonable inferences, the case will be submitted to the jury. *See Augusta Iron & Steel*, 835 F.2d at 856.

When considering cross-motions for summary judgment, the court evaluates each motion under the same standard. *Cubic Def. Sys. Inc. v. United States*, 45 Fed. Cl. 450, 457 (1999). If genuine disputes exist over material facts, both motions must be denied. *Mingus Contractors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

IV. Parties' Arguments and Analysis

Arguments

Swisher raises four objections to the FETRA assessments.

A. Takings

Swisher alleges that FETRA violates the Takings Clause by requiring Swisher to make payments to the TTF. (Dkt. 1, ¶¶ 93-94). Specifically, Swisher claims that FETRA effects a direct transfer of money from manufacturers to private individuals, in this case, producers (Dkt. 1, ¶ 52). The Secretary claims that what Swisher describes as a taking is "nothing more than a tax." (Dkt. 24 at p. 8). The Secretary claims that FETRA was passed as part of a tax bill, the American Jobs Creation Act of 2004, 26 U.S.C. §§ 199 et seq., and that FETRA simply creates an obligation for manufacturers to pay money to the government. The Secretary further claims that the Takings Clause can be applied to the payment of money to the government only where "a specific fund of money is at issue . . . ." (Dkt. 24 at p. 9). The Secretary claims that in the "absence of such specific, articulable, funds of money, there can be no Takings Clause claim based on an obligation to pay or be paid money." (Dkt. 24 at p. 9).

In support of this contention, the Secretary claims that "several federal courts have recognized that in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a majority of the Supreme Court held that the obligation to pay money cannot be considered a taking under the

Takings Clause. (Dkt. 24 at p. 9). The Secretary characterizes the *Eastern Enterprises* case as follows:

> In *Eastern Enterprises*, a four-justice plurality decided that the Coal Act unconstitutionally required a former operator of a coal mine to fund health benefits for retired miners who were former employers . . . . But, *Eastern Enterprises* was decided by a fractured court. Justice Kennedy, in his concurrence, disagreed with the plurality's conclusion that the Coal Act constituted a taking . . . . Rather, he would have decided the case on due process grounds . . . . The four dissenters rejected the notion that a Takings Clause analysis applied because the case involved "not an interest in physical or intellectual property, but an ordinary liability to pay money. . . ." Thus, five justices agreed that regulatory actions requiring the payment of moneys are not takings. . . .

(Dkt. 24, pp. 9-10 (internal citations to *Eastern Enterprises* omitted)).

Swisher responds that "in an effort to duck the Takings Clause analysis altogether, [the Secretary] asserts that Takings Clause scrutiny is inapplicable here because FETRA is 'nothing more than a tax.'" (Dkt. 34 at p.15). Citing *Eastern Enterprises* for support, Swisher engages in a takings analysis using the three-part test set forth in *Connolly v. Pension Benefit Guar. Co.*, 475 U.S. 211 (1986), which is fully articulated below. Swisher further argues that the Supreme Court has "repeatedly held that an obligation to pay money can be struck down under the Takings Clause." (Dkt. 34 at 19, citing to *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980)). Lastly, Swisher claims that the

Secretary's attempt to distinguish *Phillips* and *Webb's* on the basis that in those cases a "specific fund of money [wa]s at issue" is "nonsensical." (Dkt. 34 at p. 19, citing to Dkt. 24 at p. 9).

In the Reply, the Secretary first claims that the FETRA assessment constitutes a tax under the three-factor tax vs. regulatory fee test set out in *San Juan Cellular Telephone Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992).[9] The Secretary further claims that even if the FETRA assessments were not taxes, the Secretary would still prevail on Swisher's constitutional claims because the Takings Clause does not apply to the payment of money to the government unless a specific fund of money is at issue.

In the Response, Swisher argues that the three-factor test employed in *San Juan Cellular*, in fact, confirms "unmistakably that the FETRA assessments are regulatory fees and not 'taxes.'" (Dkt. 37 at p. 4). Swisher reiterates in the Response that under the regulatory takings analysis FETRA's assessments are unconstitutional Finally, Swisher also claims in the Response that the takings analysis is applicable because in this case, there is a particular fund of money at issue, which is the "very specific amount of money that the USDA has assessed and collected from Swisher under FETRA . . . ." (Dkt. 37 at p. 10).

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[9] In *San Juan Cellular* the court set out a three-factor test to determine whether a case involves a tax or regulatory fee under the Tax Injunction Act, 28 U.S.C. § 1341, which precludes federal courts from enjoining collection of any tax under state law. The three factors are whether the payment is: (1) imposed by an agency or the legislature; (2) imposed upon those being regulated or the community as a whole; and, (3) for the purpose of defraying regulatory costs or to raise revenue.

B. Due Process

Swisher claims that by enforcing FETRA, the Secretary has deprived Swisher of property without due process of law. (Dkt. 1, ¶¶ 98-100). In support Swisher claims that FETRA unfairly imposes assessments on it, and all manufacturers, without regard to those companies' involvement or non-involvement in the old quota system. Swisher claims that during the last ten years it purchased over 99% of its tobacco outside of the United States (Dkt. 1, ¶ 5) and only purchased minute quantities of quota tobacco. (Dkt. 1, ¶ 23).[10]

In the Motion, the Department claims entitlement to summary judgment on Swisher's Due Process claims because a Congressional Act does not violate the Due Process Clause if it is rationally related to a legitimate public purpose and, in this case, the assessments levied under FETRA are rationally related to a legitimate public purpose. The Secretary claims that among other reasons, "Congress could have concluded that it was good, discretionary public policy to help farmers transition from the old tobacco quota and price support systems and prepare to operate for the first time in an environment where prices are market-based. (Dkt. 24, pp. 11-12, citing to 7 U.S.C. §§ 518 *et seq.*; 150 Cong. Rec. H8704-03, *H8718 19 (Oct. 7, 2004); 150 Cong. Rec. H5581-04, *H5591-92 (July 13, 2004)).

In addition, the Secretary further claims that in "the exercise of its power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others." (Dkt. 24, citing to *Sonzinsky v. United States*,

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[10] See Stipulated Facts ¶¶16-18 for the specifics and percentages of Swisher's quota tobacco purchased in FY 2002 through 2004.

300 U.S. 506, 512 (1937)). Finally, the Secretary claims that Swisher may benefit from FETRA because in the absence of price supports under the old quota system, prices for domestic tobacco are expected to decline, which may in turn cause prices for foreign tobacco to decline. This price decline could provide a benefit to companies purchasing domestic and foreign tobacco. (Dkt. 24 at p.14).

In its Cross Motion, Swisher does not directly address the arguments raised by the Secretary; rather, Swisher takes issue with the Secretary's interpretation of the *Eastern Enterprises* case. Specifically, Swisher claims that Justice Kennedy provided the plurality with the fifth vote required to strike down the Coal Act as unconstitutional when he found that "the Due Process Clause was violated because the Act unfairly imposed retroactive liability on a private company that had not participated in the conduct that harmed the mine worker retirees, and that could not have anticipated being subject to health care liability after the fact." (Dkt. 34 at p. 25, citing to *Eastern Enterprises*, 524 U.S. at 547-50).

In the Reply, the Secretary claims that Swisher's due process argument is completely lacking in legal basis because 1) in *Eastern Enterprises* only Justice Kennedy referenced the Due Process clause and 2) FETRA is "not retroactive in nature, but rather it is simply a condition [of] doing business." (Dkt. 35 at p. 13). Finally, the Secretary claims that because the Cross Motion failed to address the due process arguments raised by the Secretary, those arguments are now conceded and the Secretary is entitled to summary judgment on this issue. In its Response, Swisher argues that it has not conceded its due process claims. Rather, Swisher contends that

these claims are still viable and not simply preserved but "compelling." (Dkt. 37 at p.16).

C. Equal Protection[11]

Swisher claims that the Secretary violated the Equal Protection Clause[12] by subjecting Swisher to "adverse and differential treatment based on completely irrational rules and regulations which in no way are calculated to further the ends of FETRA." (Dkt. 1, ¶ 103). Specifically, Swisher alleges that FETRA discriminates against it in three ways: (1) the maximum excise tax rate is used for calculating the cigar class share at Step A; (2) at Step B, list price is used to allocate shares among cigar manufacturers, while for other tobacco products the class share is allocated based on units (this, Swisher alleges prevents it from passing the cost on to consumers); and, (3) small and large cigars are treated as like products for the purpose of allocating FETRA liability.

The Secretary responds that Swisher's arguments fail because:

> [T]he only statutorily fixed excise tax rate is used for all tobacco products, not solely for large cigars. Contrary to [Swisher's] misreading of [FETRA], list price is not used in allocating the

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[11] The parties spent considerable time briefing this issue and provided the Court with detailed support for their positions. During oral argument, however, the parties distilled their positions and honed their arguments. Because the oral arguments represent the essence of the parties' differences, the Court will refer to them when addressing this constitutional claim.

[12] The Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government, but by its terms, applies only to the States. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). However, principles of equal protection are applied to the federal government as a component of the Fifth Amendment's Due Process Clause. *Id.* at 499-500.

> cigar class's payments. Further, to the extent that [FETRA] treats cigars differently than other forms of tobacco at Steps A and B, such distinctions are supported by rational bases. Finally, Congress's decision to group large and small cigars into a single class is not irrational.

(Dkt. 24 at p.15).

D. APA Violations

Finally, Swisher claims that the regulations promulgated under FETRA violate the APA because the FETRA assessments imposed on Swisher are "grossly excessive" and not "supported by the preponderance of the information available to the Secretary." (Dkt. 1, ¶ 107). The Secretary moved for summary judgment on these issues claiming that the standard of review under the APA is extremely deferential and that Swisher's arguments under the APA are essentially the same as its due process and equal protection arguments.

Swisher failed to address any of the APA arguments raised by the Secretary. The Secretary claims now that this failure means that Swisher has conceded its APA arguments. The Court agrees. Thus, these claims are no longer before the Court.

V. Analysis

The threshold issue in this case is whether FETRA is a tax or an assessment. A tax is usually "imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *San Juan Cellular Telephone Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685

(1st Cir. 1992). "A 'regulatory fee' is imposed by an agency upon those subject to its regulation." *Id.* A regulatory fee may serve its purpose directly (by deliberately discouraging behavior by making it more expensive) or indirectly (by raising money placed in a special fund to help defray an agency's regulation related expenses). *Id.*

The Secretary claims that the "FETRA assessment is a tax on Swisher's current production of cigars, no different in the final analysis, than the excise taxes its pays pursuant to the Internal Revenue Code on the cigars it manufactures." (Dkt. 35 at p. 6). The Secretary claims that the FETRA fee is simply a revenue measure that has an impact on all members engaged in a certain activity. (Dkt. 35 at p. 4). Stated differently, the Secretary claims that FETRA creates an "obligation for ongoing manufacturers and importers of tobacco products to pay money to the government in connection with future, not past marketings - that is, the assessments are a condition of doing business in tobacco . . . ." (Dkt. 35 at p. 2). Swisher, of course, claims that the FETRA fees are not a tax and the Secretary is attempting in vain to fit its argument into "the framework courts have developed for distinguishing between 'assessments' and 'taxes' for purposes of the Tax Injunction Act," 28 U.S.C. § 1341 ("TIA"). (Dkt. 37 at p. 4).

Swisher is referring to *San Juan Cellular*, which remains the leading case on this issue. The *San Juan Cellular* court set out a three-factor test to determine whether a case involves a "tax" or "regulatory fee" under the TIA, which precludes federal courts from enjoining collection of any tax under state law. The three factors are whether the payment is: (1) imposed by an agency or the legislature; (2) imposed upon those being regulated

or the community as a whole; and, (3) for the purpose of defraying regulatory costs or to raise revenue.

The problem here is three-fold. First, the FETRA fee does not conform neatly to the "classic" definitions of "tax" and "regulatory fee." Second, *San Juan Cellular* is the formula used for classifying "exactions under the [TIA] - asking whether the payment is a tax to raise general revenue or is a fee incident to regulation." *Trailer Marine Transport Corp. v. Rivera*, 977 F.2d 1 (1st Cir. 1992). The TIA is not implicated here. Third, as will be seen, the three *San Juan Cellular* factors are not particularly useful in this case.

The first *San Juan Cellular* factor suggests the FETRA fee is a tax because it is imposed by Congress. The second *San Juan Cellular* factor suggests that the FETRA fee is an assessment because it is imposed only on a narrow class of persons – tobacco manufacturers. In close cases such as this, courts have emphasized the importance of the third factor from *San Juan Cellular* - the ultimate use of the fees.[13] *See id.* at 685; *see also Hager v. City of West Peoria*, 84 F.3d 865, 870-71 (7th Cir. 1996) ("Rather than a question solely of *where* the

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[13] Plaintiff informs the Court that the word "tax" is never used in FETRA, only the word "assessment." However, this fact is not of critical import. The label given by a state for an assessment or charge is not dispositive. *Marcus v. Kansas Dep't. of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999)(citing to *Wright v. McClain*, 835 F.2d 135, 144 (6th Cir. 1987) and *Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 946 (1st Cir. 1997) for the same proposition). The Secretary's argument that FETRA was passed as part of a tax bill, the American Jobs Creation Act of 2004, 26 U.S.C. §§ 199 *et seq.*, is also not of critical import. Further complicating the Court's analysis applying the third *San Juan Cellular* factor is the fact that previous court decisions have "applied the label 'tax' . . . to a range of exactions that might not be commonly described as taxes . . . ." *Trailer Marine Transport*, 977 F.2d at 5 (collecting cases exemplifying this application).

money goes, the issue is *why* the money is taken."). The FETRA fee is neither exclusively paid to defray regulatory costs nor to raise revenue. The FETRA fee raises money to "enable tobacco farmers to transition into the free market." (Dkt. 35 at p. 4). Essentially, the FETRA fee provides funds to help dismantle a regulatory system, that is, the former federal price support system. Although the hybrid FETRA fee appears to this Court to provide the Federal Government with a financial framework that allows it to avoid directly paying for this free market transition. It is clear that the FETRA fee is more about deregulation than revenue. Certainly payments for the cost of a regulatory system would fall in the regulation category. So then should the cost for dismantling it. Swisher itself wrote and the Court agrees that, "the whole point of FETRA is that the [Department] will continue to regulate tobacco growing for the next decade . . . by way of calculating, allocating and collecting $10 billion in assessments from manufacturers . . . ." (Dkt. 37 at p. 9).

The Court finds that FETRA is primarily concerned with regulation - albeit through the seemingly incongruous aim of aiding in the transition of formerly heavily regulated industry to a free market system. If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax. *See State of S.C. ex. Rel Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (citing to *United States v. Strangland*, 242 F.2d 843, 848 (7th Cir. 1957) and *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943)). Having made this initial determination that the FETRA fee is an assessment and not a tax, the Court addresses the parties' substantive constitutional arguments.

A. Takings

Often called the Just Compensation Clause, the final Clause of the Fifth Amendment reads that "private property shall not be taken for public use without just compensation. U.S. Const. amend. V. While it confirms the government's authority to confiscate private property, the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for "public use" and "just compensation" must be paid. The aim of the Clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

"Classic" takings cases involve situations in which the government directly appropriates private property for its own use. *See e.g., United States v. Security Industrial Bank,* 459 U.S. 70, 78 (1982). A taking may occur as a result of a regulatory action that is neither a physical invasion nor a physical restraint. As stated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415. However not all regulatory actions will constitute a regulatory taking. *Id.* at 415. The large body of Supreme Court cases addressing "physical" takings, for the most part, involves the straightforward application of *per se* rules.

In contrast, the Supreme Court's "regulatory" takings analysis "is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all of the relevant circumstances.'" *Brown v.*

Legal Foundation of Washington, 538 U.S. 216, 233 (2003) (internal citations omitted). That *ad hoc,* factual inquiry is conducted using three factors of "particular significance" as set forth in *Connolly v. Pension Benefit Guar. Co.*, 475 U.S. at 225 (1986) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978)), that is: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with the claimant's investment backed expectations, and (3) the nature of the governmental action." *See also Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

The fact-intensive nature of takings claims has caused some courts to find summary judgment to be inappropriate; however, where a court finds, as the Court does here, that the material facts have been adequately developed on the record and no genuine issues of material fact exist, summary judgment is appropriate. *See Chang v. United States*, 859 F.2d 893, 898 (Fed. Cir. 1988) (holding that even though a regulatory taking analysis is normally *ad hoc* and fact-intensive, the United States may still be entitled to summary judgment as a matter of law).

A proper takings analysis begins by identifying the property interest at stake. Swisher claims that the property at stake is "a specific sum of money that it once had but that the USDA took from it." (Dkt. 37 at p. 11). The Secretary claims that "[t]here is no property interest at stake in an ordinary obligation to pay money." (Dkt. 35 at p. 7). Both parties rely on the Supreme Court's decision in *Eastern Enterprises*, to support their positions. Swisher cites to the plurality's takings analysis in *Eastern Enterprises* to support its position. The Secretary claims that the precedential import of "*Eastern*

Enterprises with respect to the Taking's Clause is that the Taking's Clause does not apply to the government taking money." (Dkt. 35 at p. 7). The Court agrees with the Secretary's position based on the well-reasoned opinion in *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29 (Fed. Cl. 2000)(*Commonwealth Edison I*), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001), which found that "discerning a controlling rule of law from the welter of conflicting opinions in *Eastern* requires careful reflection . . . in cases where approaches fundamentally differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court." *Commonwealth Edison I*, 46 Fed. Cl. at 39. The *Commonwealth Edison I* court further noted that "numerous courts have recently agreed with this conclusion, observing that *Eastern* essentially leaves takings law unaffected." *Id.* at 40 (listing cases in agreement). As its final step, the *Commonwealth Edison I* court conducted a thorough review of cases (which this Court will not reproduce here) and distinguished *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).[14] After this review, the *Commonwealth Edison I*

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[14] Swisher argues that "if the money is a concrete obligation and not an abstract obligation . . . if it's definitive, non-speculative and concrete, and it's money that's property, and that's subject to takings analysis." (Dkt. 43, pp. 15-16). Swisher relies on the court's holding in *Webb*. In *Webb* the court found that a state statute pursuant to which a county could take the interest accruing on an interpleader fund deposited in the registry of the county court was unconstitutional in violation of the Takings Clause of the Fifth and Fourteenth Amendments. Swisher's reliance on *Webb* is misplaced. FETRA's assessment is still more akin to the imposition of a financial burden than it is to the specific interest accruing on a specific fund like the one at issue in *Webb*. In addition, the Court notes that although the financial hardship imposed by FETRA is inescapable, Swisher's yearly assessment is variable. In addition, although FETRA provides a definitive cap of $10.14 billion (with $9.6 billion in expected

court concluded that "[t]aken together, these cases lead this court to conclude that a government-imposed payment of money cannot result in a compensable taking." *Id.* at 41. This Court agrees.

In a footnote, the *Commonwealth Edison* I court also found that were it obliged to apply a takings analysis, using the three factors set out in *Connolly*, to the special assessment, "it would, nonetheless, conclude that there has been no taking here." *Id.* at 42, n.17. This Court reaches the same conclusion with the facts before it. The three *Connolly* factors are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with the claimant's investment backed expectations, and (3) the nature of the governmental action.

FETRA may have a $100 million dollar impact on Swisher over the ten-year period that it covers. Swisher paid over $11 million in FETRA fees during the first calendar year FETRA was enacted. Swisher claims that these assessments constitute a "considerable financial burden." (Dkt. 34 at p.11). Swisher claims that FETRA forces tobacco manufacturers to finance "a nearly $10 billion payoff to growers that was entirely unanticipated, was never agreed to by manufacturers, and that is particularly unjust given the seventy years of government largess that the price support system has already provided to growers at manufacturer's expense." (Dkt. 34 at p. 11, citing to the Fraleigh Decl. ¶¶ 4-7). Swisher further claims that it had only a "glancing" interaction

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payments to quota holders and producers and $540 million to cover anticipated losses and eligible expenses), the Secretary has as of September 2006, entered into contracts with producers approximating only $2.9 billion. *See Neese v. Johanns*, 450 F.Supp.2d 632 (W.D. Va. 2006).

with the former price support system because that system dealt mainly with cigarette-type tobacco. Swisher further claims that its purchases of other kinds of tobacco represent less than one-twentieth of one percent of the tobacco subject to the program . . ." (Dkt. 34 at p. 12, citing to the Fraleigh Decl. ¶¶ 4-7; Stipulated Facts ¶¶ 13-20). Swisher claims that its responsibility under FETRA is retroactively imposed and "untethered" to its past conduct and responsibility. Turning to the third *Connelly* prong - the nature and character of the government program – Swisher characterizes FETRA as a "pay-off" or "wealth transfer" from manufacturers to growers. Swisher further claims that FETRA serves no general public purpose.

In response, the Secretary argues that although "$10 million a year sounds like a lot of money, the fact remains that while we're talking about the FETRA, the effect of the FETRA on Swisher it is less than one-tenth of a cent of tax on each cigar, which means that we're talking about less than a dollar on every thousand cigars. The current maximum excise tax is $48.75 per thousand cigars. [Swisher is] contending that the difference between $48.75 and $49.75 is some sort of extreme burden on them." (Dkt. 43 at p. 31).

With respect to Swisher's expectations, the Secretary also claims, that the manufacture of tobacco is a "heavily taxed industry, so it should certainly come as no shock to any company that is in the business of producing cigars, cigarettes or other tobacco products, that there is a government tax."[15] Swisher's counter arguments are

[15] The Court has already determined that the FETRA fee is an assessment and not a tax; however, the basic principle is the same - an entity engaged in the manufacture of tobacco should not be surprised by a Government assessment.

compelling. Swisher did participate in the previous tobacco marketing quota and related price support programs and tobacco manufacturing is heavily regulated. Swisher has called the Court's attention on multiple occasions to the provisions of the Master Settlement Agreement (the "MSA").[16] Even though Swisher was not a signatory to the MSA, it was aware of its provisions and the potential impact that it might have.

Congress has made clear that FETRA serves the public purpose of aiding farmers in the difficult and potentially financially ruinous transition to the free market. At the Secretary contends the nature and character of the program "is not to impose a liability on a wrong, rather it is to generate revenue to pay for a program. FETRA accomplishes that goal by assessing all of the companies in the industry that purchased tobacco in the past and uses the funds raised to pay to help the tobacco growers and producers transition into a free market economy." (Dkt. 43 at p. 32). The Secretary adds that this act of aiding growers in the transition to the free market, to ensure that they do not fail, provides a benefit to the public. Swisher's attempts to prove that FETRA's fees constitute a taking are as tortured as the Secretary's attempts to avoid having FETRA's fees characterized as

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[16] The MSA is a settlement agreement between four cigarette manufacturers and the attorney generals of forty-six states, the District of Columbia, the Commonwealth of Puerto Rico, and four other American territories. The MSA requires the cigarette manufacturers to make payments to the signatory states and other entities and establishes a trust fund to compensate tobacco farmers for losses that may result from an increase in cigarette prices or a decrease in consumption. (Dkt. 1, ¶ 26). Swisher alleges that participation in the TTPP constitutes an offset under the MSA for the four cigarette manufacturers. (Dkt 1, ¶ 29). See *State of North Carolina v. Phillip Morris USA Inc.*, 618 S.E.2d 219 (N.C. Sup. Ct. 2005), for an in-depth review of the politics underpinning the MSA and its relation to FETRA.

assessments. As the Court stated previously, in-depth analysis on this issue is unnecessary. To paraphrase the court in *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362 (2d Cir. 2006), sometimes the net effect of a regulation may "well be to take from Peter to pay Paul, but such burden shifting does not, without more, amount to a regulatory taking." *Buffalo Teachers Federation*, 464 F.3d at p. 376 (citing to *Connolly*, 475 US at 223, for the proposition that "[g]iven the proprietary of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever the litigation required one person to use his or her assets for the benefit of another."). In conclusion then, there is no Takings Clause claim in this case and summary judgment for the Secretary is appropriate.

B. Due Process

The standard of review for a due process challenge is well-settled. The Supreme Court stated in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976), "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."

In *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), the court noted that "[w]here the basis for the challenge is retroactivity, the Supreme Court has held that due process is satisfied 'simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.'" *Id.* at 1341 (internal citations omitted). As to the law vs. fact

aspect of this issue, the *Commonwealth Edison* court further noted that:

> In judging the rationality of legislation under the Due Process Clause, an evidentiary trial of facts, . . . is not required. Rather, . . . [T]he question is whether the legislative conclusion [to enact the statute] was reasonable and supported by the substantial evidence in the record before Congress. In making that determination, we are not to re-weigh the evidence *de novo*, or to replace Congress' factual predictions with our own. Rather, we are simply to determine if the standard [of review] is satisfied. If it is, summary judgment . . . is appropriate regardless of whether the evidence is in conflict.

Commonwealth Edison, 271 F.3d at 1341-42 (internal citations omitted).

After conducting an exhaustive review of Supreme Court due process case history, the *Commonwealth Edison* court, citing to Justice Kennedy in *Eastern Enterprises*, stated that "'[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances. *Commonwealth Edison*, 271 F.3d at 1345 (quoting from *Eastern Enterprises*, 524 U.S. at 550).[17] The *Commonwealth Edison* court then identified two factors, which if met, would render "even severe retroactive obligations . . . rational and . . . constitutional under the Due Process clause." *Id.* at 1346. These factors are if "(1) Congress reasonably concluded that the party

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[17] The *Commonwealth Edison* court further noted that "[a]lthough such 'most egregious circumstances' do not exist *unless* the legislation is severely retroactive, they do not exist *merely* because the legislation is severely retroactive and costly." *Commonwealth Edison*, 271 F.3d at 1345-46.

subjected to retroactive obligations benefitted from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations." *Id.* (noting that legislation may be constitutional if either of the two conditions is satisfied, but that the court need not reach that decision in that case because both conditions were present).

The *Commonwealth Edison* court succinctly concluded that "[i]n short, legislative facts control the analysis. In these Due Process cases the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts. We are charged simply with determining whether the congressional action was rational." *Id.* at 1342.

Swisher's due process arguments suffer from three fatal flaws - first, Swisher's due process analysis relies on *Eastern Enterprises*; second, Swisher has not demonstrated that FETRA is either arbitrary or irrational; and, even assuming that FETRA is retroactive, it would still be rational under the two-factor test enumerated in *Commonwealth Edison*.

The Secretary rightly notes that Swisher's due process arguments are scant. Instead of providing substantive arguments on the issue, Swisher piggybacks its due process arguments with its takings analysis under the three factors set out in *Connolly*. Swisher places too much reliance on *Eastern Enterprises*. As the court in *Commonwealth Edison* noted, "[t]he District of Columbia Circuit has concluded that the plurality and concurrence in *Eastern Enterprises* cannot be combined into a single holding on the Due Process issue." *Id.* at 1344, n.14 (citing to *Ass'n of Bituminous Contractors v.*

Apfel, 156 F.3d 1246, 1254- 55 (D.C. Cir. 1998), which found that "Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding from *Eastern Enterprises* fragmented parts . . . . [Justice Kennedy] alone was willing to invalidate economic legislation on the ground that it violated the Due Process Clause. And, as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis.").[18]

Congress enacted FETRA to help farmers transition from the old tobacco quota and price support systems to a market based system. Congress thought this was necessary to aid the largely aging quota holders who relied on quota leases to maintain income and to stem the economic ripple effect facing large tobacco-producing states, like North Carolina and Kentucky, from the MSA's decreasing the demand for domestically produced tobacco. *See* Matthew Nis Leerberg, *Takings and Statutory Entitlement: Does the Tobacco Buyout Take Quota Rights Without Just Compensation?*, 55 DUKE L.J. 865, 871 (2006). This clearly is a legitimate purpose for enacting FETRA. However, even if this were not a legitimate purpose, "the challenged legislation . . . is to be upheld if there is any conceivable rational basis supporting it, whether or not the Congress had that particular basis in mind when the legislation was enacted. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

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[18] The *Bituminous* court also stated that, "although the plurality noted that 'analysis of legislation under the Takings and Due Process Clauses is correlated to some extent . . . a correlation is not an equivalency." *Bituminous*, 156 F.3d at 1254.

The means employed by Congress to facilitate the goals of FETRA cannot be called "irrational." Congress tapped tobacco manufacturers who had purchased tobacco under the old support system to bear some of the costs associated with dismantling that system. Swisher does not dispute that it purchased tobacco under the old system, rather it claims that its purchases were minimal. Past participation is a rational basis for requiring Swisher to participate in FETRA.

Swisher continually claims that FETRA is retroactive. The Secretary claims that Swisher is not retroactive, rather it is simply "a condition of doing business." (Dkt. 35 at p. 13). The Court need not make a final determination, because even giving Swisher the benefit of the doubt about FETRA's retroactivity, Swisher's due process arguments fail under the two-factor test enumerated in *Commonwealth Edison.*

Congress reasonably concluded that the party subjected to retroactive obligations benefitted from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party. Swisher claims, and the Court does not disagree entirely, that Swisher does not appear to have directly benefitted from its participation in the old quota system. However, some of the purposes of the old quota system could be viewed as beneficial to Swisher. The quota system was designed in part to combat the lack of "orderly marketing" of tobacco by ensuring that tobacco manufacturers would have an ample but not excessive supply of acceptable tobacco. *See* Nis Leerberg, 55 *DUKE L.J.* at 868 (2006). In addition, Swisher purchased foreign grown tobacco, which is far cheaper than domestically grown tobacco. Foreign grown tobacco was so much cheaper than domestically grown tobacco, in

part, because of the old quota system and price supports. It cannot be denied that Swisher, as it has acknowledged, benefitted from the ability to purchase cheap foreign tobacco. The Court has already noted that although $10 million a year may sound egregious that "impact" is actually "one-tenth of a cent of tax on each cigar . . . ." (Dkt. 43 at p.31). This is not an extreme, or even necessarily a disproportionate, liability.

The second factor is that the imposition of retroactive liability would not be contrary to that party's reasonable expectations. As noted above, the tobacco industry was traditionally and is currently heavily regulated. The MSA was signed on November 16, 1998. The MSA was expected to reduce demand for tobacco, which it did. The market for domestically grown tobacco shrank dramatically from 1998 to 2004. *See* Nis Leerberg, 55 *DUKE L.J.* at 866 (2006). From 1997 until 2004, when FETRA was signed into law, these acknowledged problems within the tobacco industry prompted members of Congress to introduce more than twenty tobacco buyout bills. *See State of North Carolina v. Phillip Morris USA Inc.*, 618 S.E.2d 219 (N.C. Sup. Ct. 2005). It is clear from the sheer volume of legislation generated to address fallout from MSA that anyone affiliated with tobacco would be aware that sooner or later Congress was going to act to aid tobacco growers. As a past purchaser under the old system, Swisher might reasonably be expected to participate in the dismantling of that system.

In upholding the Federal Claims court's dismissal of due process and equal protection claims, the court in *Maine Yankee Atomic Power Co. v. United States*, 271 F.3d 1357, 1359- 60 (Fed. Cir. 2001), stated that although the plaintiffs may have preferred a different

system, "Congress's assignment of liability for a past problem to past consumers does not stretch the limits of the reasonable." That sentiment holds true here. FETRA does not violate the Due Process Clause and the Secretary is entitled the summary judgment on this issue.

C. Equal Protection

The Supreme Court has warned that,"[w]hether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Rather, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that *could* provide a rational basis for the classification." *Id.* (citations omitted) (emphasis added).

This standard of review, i.e., rational basis review, is a "paradigm of judicial restraint." *Id.* So, where there are "plausible reasons for Congress' action," the court's inquiry must be "at an end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *see also BellSouth Corp. v. FCC*, 162 F.3d 678, 691 (D.C. Cir. 1998) (same); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (a court's inquiry is limited to asking whether "the legislation classif[ies] the persons it affects in a manner rationally related to legitimate government objectives").

In this arena, government action bears "a strong presumption of validity" and the party challenging it

"ha[s] the burden 'to negative *every conceivable basis* which might support it.'" *Beach Commc'ns*, 508 U.S. at 314-15 (citations omitted) (emphasis added). That is, so long as the reviewing court can conceive of facts which reasonably justify the classification at issue, governmental action survives rational basis review. *Id.* at 315. Such deference is afforded the government because "'the legislature must necessarily engage in a process of line-drawing.'" *BellSouth Corp.*, 162 F.3d at 692 (quoting *Fritz*, 449 U.S. at 179). "Defining the class of persons subject to a regulatory requirement - much like classifying governmental beneficiaries - 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *Beach Commc'ns*, 508 U.S. at 315 (quoting Fritz, 449 U.S. at 179); *see also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) ("Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and ability to function.")(citation omitted).

Under FETRA there is a two-step process to determine a manufacturer's quarterly assessment. First, the overall amount needed to make transition payments to producers is allocated among the six classes of tobacco set out in FETRA, i.e., cigarettes, cigars, snuff, roll-your-own, chewing and pipe ("Step A"). 7 U.S.C. § 518(c)(1). Second, within each class, the amount required to be paid by each manufacturer is allocated on a pro rata basis based upon each manufacturer's share of

gross domestic volume as calculated under the statute ("Step B"). 7 U.S.C. § 518(e).

Swisher's Step A objection is that the maximum excise tax is used for calculating the cigar share of the portion. (Dkt. 43 at p. 33). Specifically, Swisher claims that the USDA's practice of applying maximum excise tax rates to large cigars, but actual tax rates to every other type of tobacco product, violates the equal protection principle embodied in the fifth Amendment. (Dkt. 34 at p. 28). Swisher further claims that "[b]ecause the USDA uses the maximum excise tax rate for large cigars, the cigar class necessarily receives a larger portion of the Step A burden than it would receive if a [sic] actual excise taxes were used uniformly for all tobacco products, including large cigars." (Dkt. 34 at p. 28). Swisher acknowledges that the "Government is entitled to make approximations and create proxies in allocating a financial burden among different groups;" however, Swisher concludes that the Government "cannot treat like products differently without some affirmative rationale." (Dkt. 34 at p. 29- 30).

The Secretary explained Congress's rationale in Step A by stating that:

> Plaintiff would like you to believe that the actual excise tax is the loadstone, but the fact is that what Congress did was take the fixed tax which is set in the statute for each of these items. It is true that there is only one number for everything except large cigars. That's the number that Congress took. Whatever the actual excise tax, whatever the fixed excise tax for cigarettes, that's what Congress used. When it came to large cigars, large cigars are inherently different from a taxing perspective from all those other products

because they are not subject to just one level of taxation. They have a sliding scale amount of taxation that goes up. It's approximately 20% percent of the value and it caps out at $48.75 per thousand cigars. Congress determined that it should use a fixed rate for large cigars, just like it was using a fixed rate for every other group of tobacco products. This was rational because it enables easy comparison from year to year and much easier calculations of the class A. These are administrative conveniences that are sufficient to satisfy rational basis review.

The question then becomes, was it rational to pick the particular fixed rate that they picked in this instance . . . They picked the rate that was in the statute. . . . It was also rational for the Congress to rely on the maximum excise tax rate because it did not have readily available to it actual excise tax rates at the time that it created the Step A distinctions in the statute.

(Dkt. 43, pp. 33-35).

The Secretary further claims that:

Another reason that it is rational for the Congress to have used the maximum excise tax rate, a fixed rate, is because it enables easier year-to-year comparisons regarding the sales. If the Congress had to deal with changing from year to year, both the number of cigars that were sold and what tax rates were being applied, it is much more difficult to calculate the relative market on a year-to-year basis. When you fix the excise tax rate, then the only thing that is changing is the volume of sales, which makes tracking year-to-year much easier,

> which again is an administrative convenience that is sufficient to justify a rational basis."

(Dkt. 43 at p. 35).

Swisher objects to Step B because large and small cigars are treated as part of one group. Specifically, Swisher argues that the Step B "method of allocating the intra-class share of the class's overall payment violates principles of equal protection because it is based on volume date, i.e., number of cigars sold, thereby treating all types of cigars the same regardless of how much the cigars cost." (Dkt. 35 at p. 17). Swisher informed the Court about the differences between large and small cigars - as to size, shape, weight cost and tax treatment. Little cigars are subject to an excise tax exactly like cigarettes - a flat tax. Large cigars are subject to the variable rate discussed above. Swisher informed the Court that it is the most successful manufacturer of little cigars domestically and internationally. (Dkt. 43 at p. 21). So fundamentally, Swisher is a little cigar company. At Step B, for volume purpose, Congress treats little and big cigars the same. Swisher argues that this treatment has the effect of increasing Swisher's responsibility relative to other cigar companies.

The Secretary responds that Congress rationally determined that each set of tobacco products should be treated as one group. "All of the cigarettes are grouped together, all of the snuff, and all of the cigars." (Dkt. 43 at p. 36). The Secretary acknowledges that not all cigars are the same cost, but also claims that not all cigarettes are the same price. For administrative ease, Congress "decided the easiest thing to do was to have groups that simply included the entire set of each tobacco product." (Dkt. 43 at p. 37). As the Secretary argued:

Swisher's final contention is that it is inconsistent to treat small and large cigars together at Step B when they are treated separately at Step A. The Secretary responds that: As long as both decisions had rational bases, the statute is constitutional. In this instance, it seems clear that Congress treated small and large cigars separately at Step A because Step A utilizes excise tax rates to calculate the inter-class percentages, and small and large cigars have different excise tax rates. Thus, it would have been difficult to group small and large cigars together, so it was rational to separate them. At Step B, however, excise tax rates do not come into play. Rather, at Step B allocation is based on volume, which is measured on the same basis, per stick, for both small and large cigars. It was rational therefore, to combine all cigars into one group.

It was not irrational for Congress to use excise taxes at Step A and not at Step B. At Step A, Congress was distinguishing among several different classes of products that were not similar to one another. Some products' volume was measured in pounds, others' in number of sticks sold . . .Thus, the products were not comparable, and Congress used excise tax rates to convert them into like units of measurement to enable it to make comparisons (allocations) between the classes at Step A." However, at Step B, allocation were made among companies within the same product class, whose volume is measured in the same units . . . . [Thus,] it was rational to apply the same method of class B assessment to each of the

> product categories, based on the number of taxable units, rather than try to come up with some assertedly "fairer" but more cumbersome system that would make individualized assessments of value assigned to particular sticks in the market place. Such individualization is simply not required under the rational basis test.

(Dkt. 35 at p.19).

Having laid out the parties' arguments, the Court understands Swisher's frustration with FETRA. The Court further appreciates that had the implementing regulations been formulated in the manner Swisher desires, they might be more fair to Swisher. However, in the context of equal protection, sympathy and potentially better methodology cannot factor into our analysis. During oral argument, Swisher's counsel noted on the record that his client's equal protection claims are strong and compelling. (Dkt. 43 at p. 22). However, he also noted that such claims are rarely upheld.

Under the principles espoused above, FETRA's implementing regulations are constitutional. Swisher has failed to meet its burden of negating the Secretary's proffered rationales. The ultimate wisdom of the implementing regulations might be questioned, but that is not sufficient to render the regulations unconstitutional or to create an issue of material fact for purposes of surviving summary judgment. As the court stated in *Brown-Forman Co. v. Commonwealth of Kentucky*, 217 U.S. 563, 573 (1910), "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection under the law.'" Administrative efficiency has been found to provide a rational basis. *See Partlo v. Johanns*, 2006 WL 1663380

at *17 (D.D.C June 11, 2006) (internal citations omitted).[19]

The FETRA implementing regulations are rationally related to a legitimate government purpose and do not violate the Equal Protection Clause of the Constitution, thus the Secretary is entitled to summary judgment on this issue.

[19] The court's analysis in *Partlo* is very instructive on the issues presented by this case.

VI. Conclusion

Underlying Swisher's arguments is the notion that the funds Swisher is required to pay under FETRA are more akin to an exaction than an assessment. An exaction is defined as a "fee, reward, or contribution demanded or levied with severity or injustice." *Merriam-Webster's On-Line Dictionary*, available at http://www.m-w.com/dictionary/exaction. The Court sympathizes with Swisher. However unpalatable, seemingly unjust and onerous FETRA is to Swisher, and regardless of the fact that it may have been crafted by lobbyists to relieve cigarette manufacturers of their financial burdens under the MSA, it is not unconstitutional.

In accordance with the Court's findings above, summary judgment is appropriate for the Secretary on all counts in the Complaint. The Secretary's Motion for Summary Judgment (Dkt. 24) is **GRANTED** and Swisher's Cross Motion for Summary Judgment (Dkt. 34) is **DENIED**. The Clerk is **DIRECTED** to enter judgment for the Secretary and to **CLOSE** this case.

DONE and ORDERED in Chambers in Jacksonville, Florida on this 27th day of November 2007.

APPENDIX C

FAIR AND EQUITABLE TOBACCO REFORM ACT OF 2004

§ 518. Definitions

In this subchapter and subchapter II of this chapter:

(1) Agricultural Act of 1949

The term "Agricultural Act of 1949" means the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), as in effect on the day before October 22, 2004.

(2) Agricultural Adjustment Act of 1938

The term "Agricultural Adjustment Act of 1938" means the Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 et seq.), as in effect on the day before October 22, 2004.

(3) Considered planted

The term "considered planted" means tobacco that was planted, but failed to be produced as a result of a natural disaster, as determined by the Secretary.

(4) Contract

The term "contract" means a contract entered into under section 518a or 518b of this title.

(5) Contract payment

The term "contract payment" means a payment made under section 518a or 518b of this title pursuant to a contract.

(6) Producer of quota tobacco

The term "producer of quota tobacco" means an owner, operator, landlord, tenant, or sharecropper that shared in the risk of producing tobacco on a farm where tobacco was produced or considered planted pursuant to a tobacco farm poundage quota or farm acreage allotment established under part I of subtitle B of title III of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1311 et seq.).

(7) Quota tobacco

The term 'quota tobacco' [FN1] means a kind of tobacco that is subject to a farm marketing quota or farm acreage allotment for the 2004 tobacco marketing year under a marketing quota or allotment program established under part I of subtitle B of title III of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1311 et seq.).

(8) Tobacco

The term "tobacco" means each of the following kinds of tobacco:

(A) Flue-cured tobacco, comprising types 11, 12, 13, and 14.

(B) Fire-cured tobacco, comprising types 22 and 23.

(C) Dark air-cured tobacco, comprising types 35 and 36.

(D) Virginia sun-cured tobacco, comprising type 37.

(E) Virginia fire-cured tobacco, comprising type 21.

(F) Burley tobacco, comprising type 31.

(G) Cigar-filler and cigar-binder tobacco, comprising types 42, 43, 44, 53, 54, and 55.

(9) Tobacco quota holder

The term "tobacco quota holder" means a person that was an owner of a farm, as of October 22, 2004, for which a basic tobacco farm marketing quota or farm acreage allotment for quota tobacco was established for the 2004 tobacco marketing year.

(10) Tobacco Trust Fund

The term "Tobacco Trust Fund" means the Tobacco Trust Fund established under section 518e of this title.

(11) Secretary

The term "Secretary" means the Secretary of Agriculture.

§ 518a. Contract payments to tobacco quota holders

(a) Contract offered

The Secretary shall offer to enter into a contract with each tobacco quota holder under which the tobacco quota holder shall be entitled to receive payments under this section in exchange for the termination of tobacco marketing quotas and related price support under the amendments made by sections 611 and 612. The contract

payments shall constitute full and fair consideration for the termination of such tobacco marketing quotas and related price support.

(b) Eligibility

To be eligible to enter into a contract to receive a contract payment under this section, a person shall submit to the Secretary an application containing such information as the Secretary may require to demonstrate to the satisfaction of the Secretary that the person is a tobacco quota holder. The application shall be submitted within such time, in such form, and in such manner as the Secretary may require.

(c) Base quota level

(1) Establishment

The Secretary shall establish a base quota level applicable to each tobacco quota holder identified under subsection (b) of this section.

(2) Poundage quotas

Subject to adjustment under subsection (d) of this section, for each kind of tobacco for which the marketing quota is expressed in pounds, the base quota level for each tobacco quota holder shall be equal to the basic quota for quota tobacco established for the 2002 tobacco marketing year under a marketing quota program established under part I of subtitle B of title III of the Agriculture [FN1] Adjustment Act of 1938 [7 U.S.C.A. § 1311 et seq.] on the farm owned by the tobacco quota holder.

(3) Marketing quotas other than poundage quota.s

Subject to adjustment under subsection (d) of this section, for each kind of tobacco for which there is marketing quota or allotment on an acreage basis, the base quota level for each tobacco quota holder shall be the quantity equal to the product obtained by multiplying--

(A) the basic tobacco farm marketing quota or allotment for the 2002 marketing year established by the Secretary for quota tobacco owned by the tobacco quota holder; by

(B) the average production yield, per acre, for the period covering the 2001, 2002, and 2003 crop years for that kind of tobacco in the county in which the quota tobacco is located.

(d) Treatment of certain contracts and agreements

(1) Effect of purchase contract

If there was an agreement for the purchase of all or part of a farm described in subsection (c) of this section as of October 22, 2004, and the parties to the sale are unable to agree to the disposition of eligibility for contract payments, the Secretary, taking into account any transfer of quota that has been agreed to, shall provide for the equitable division of the contract payments among the parties by adjusting the determination of who is the tobacco quota holder with respect to particular pounds or allotment of the quota.

(2) Effect of agreement for permanent quota transfer

If the Secretary determines that there was in existence, as of the day before October 22, 2004, an agreement for the permanent transfer of quota, but that the transfer was not

completed by that date, the Secretary shall consider the tobacco quota holder to be the party to the agreement that, as of that date, was the owner of the farm to which the quota was to be transferred.

(e) Contract payments

(1) Calculation of total payment amount

The total amount of contract payments to which an eligible tobacco quota holder is entitled under this section, with respect to a kind of tobacco, shall be equal to the product obtained by multiplying--

(A) $7.00 per pound; by

(B) the base quota level of the tobacco quota holder determined under subsection (c) of this section with respect to that kind of tobacco.

(2) Annual payment

During each of fiscal years 2005 through 2014, the Secretary shall make a contract payment under this section to each eligible tobacco quota holder, with respect to a kind of tobacco, in an amount equal to 1/10 of the amount determined under paragraph (1) for the tobacco quota holder for that kind of tobacco.

(f) Death of tobacco quota holder

If a tobacco quota holder who is entitled to contract payments under this section dies and is survived by a spouse or one or more dependents, the right to receive the payments shall transfer to the surviving spouse or, if there is no surviving spouse, to the estate of the tobacco quota holder.

§ 518b. Contract payments for producers of quota tobacco

(a) Contract offered

The Secretary shall offer to enter into a contract with each producer of quota tobacco under which the producer of quota tobacco shall be entitled to receive payments under this section in exchange for the termination of tobacco marketing quotas and related price support under the amendments made by sections 611 and 612. The contract payments shall constitute full and fair consideration for the termination of such tobacco marketing quotas and related price support.

(b) Eligibility

(1) Application and determination

To be eligible to enter into a contract to receive a contract payment under this section, a person shall submit to the Secretary an application containing such information as the Secretary may require to demonstrate to the satisfaction of the Secretary that the person is a producer of quota tobacco. The application shall be submitted within such time, in such form, and in such manner as the Secretary may require.

(2) Effect of multiple producers for same quota tobacco

If, on the basis of the applications submitted under paragraph (1) or other information, the Secretary determines that two or more persons are a producer of the same quota tobacco, the Secretary shall provide for an equitable distribution among the persons of the contract payments made under this section with respect to that quota tobacco, based on relative share of such persons in

the risk of producing the quota tobacco and such other factors as the Secretary considers appropriate.

(c) Base quota level

(1) Establishment

The Secretary shall establish a base quota level applicable to each producer of quota tobacco, as determined under this subsection.

(2) Flue-cured and burley tobacco

In the case of Flue-cured tobacco (types 11, 12, 13, and 14) and Burley tobacco (type 31), the base quota level for each producer of quota tobacco shall be equal to the effective tobacco marketing quota (irrespective of disaster lease and transfers) under part I of subtitle B of title III of the Agriculture [FN1] Adjustment Act of 1938 [7 U.S.C.A. § 1311 et seq.] for the 2002 marketing year for quota tobacco produced on the farm.

(3) Other kinds of tobacco

In the case of each kind of tobacco (other than tobacco covered by paragraph (2)), for the purpose of calculating a contract payment to a producer of quota tobacco, the base quota level for the producer of quota tobacco shall be the quantity obtained by multiplying--

(A) the basic tobacco farm acreage allotment for the 2002 marketing year established by the Secretary for quota tobacco produced on the farm; by

(B) the average annual yield, per acre, of quota tobacco produced on the farm for the period covering the 2001, 2002, and 2003 crop years.

(d) Contract payments

(1) Calculation of total payment amount

Subject to subsection (b)(2) of this section, the total amount of contract payments to which an eligible producer of quota tobacco is entitled under this section, with respect to a kind of tobacco, shall be equal to the product obtained by multiplying--

(A) subject to paragraph (2), $3.00 per pound; by

(B) the base quota level of the producer of quota tobacco determined under subsection (c) of this section with respect to that kind of tobacco.

(2) Annual payment

During each of fiscal years 2005 through 2014, the Secretary shall make a contract payment under this section to each eligible producer of tobacco, with respect to a kind of tobacco, in an amount equal to 1/10 of the amount determined under paragraph (1) for the producer for that kind of tobacco.

(3) Variable payment rates

The rate for payments to a producer of quota tobacco under paragraph (1)(A) shall be equal to--

(A) in the case of a producer of quota tobacco that produced quota tobacco marketed, or considered planted, under a marketing quota in all three of the 2002, 2003, or 2004 tobacco marketing years, the rate prescribed under paragraph (1)(A);

(B) in the case of a producer of quota tobacco that produced quota tobacco marketed, or considered planted, under a marketing quota in only two of those tobacco marketing years, 2/3 of the rate prescribed under paragraph (1)(A);

(C) in the case of a producer of quota tobacco that produced quota tobacco marketed, or considered planted, under a marketing quota in only one of those tobacco marketing years, 1/3 of the rate prescribed under paragraph (1)(A).

(e) Death of tobacco producer

If a producer of quota tobacco who is entitled to contract payments under this section dies and is survived by a spouse or one or more dependents, the right to receive the contract payments shall transfer to the surviving spouse or, if there is no surviving spouse, to the estate of the producer.

§ 518c. Administration

(a) Time for payment of contract payments

Contract payments required to be made for a fiscal year shall be made by the Secretary as soon as practicable.

(b) Use of county committees to resolve disputes

Any dispute regarding the eligibility of a person to enter into a contract or to receive contract payments, and any dispute regarding the amount of a contract payment, may be appealed to the county committee established under section 590h of Title 16 for the county or other area in which the farming operation of the person is located.

(c) Role of National Appeals Division

Any adverse determination of a county committee under subsection (b) of this section may be appealed to the National Appeals Division established under subtitle H of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6991 et seq.).

(d) Use of financial institutions

The Secretary may use a financial institution to manage assets, make contract payments, and otherwise carry out this title.

(e) Payment to financial institutions

The Secretary shall permit a tobacco quota holder or producer of quota tobacco entitled to contract payments to assign to a financial institution the right to receive the contract payments. Upon receiving notification of the assignment, the Secretary shall make subsequent contract payments for the tobacco quota holder or producer of quota tobacco directly to the financial institution designated by the tobacco quota holder or producer of quota tobacco. The Secretary shall make information available to tobacco quota holders and producers of quota tobacco regarding their ability to elect to have the Secretary make payments directly to a financial institution under this subsection so that they may obtain a lump sum or other payment.

§ 518d. Use of assessments as source of funds for payments

(a) Definitions

In this section:

(1) Base period

The term "base period' [FN1] means the one-year period ending the June 30 before the beginning of a fiscal year.

(2) Gross domestic volume

The term "gross domestic volume" means the volume of tobacco products--

(A) removed (as defined by section 5702 of Title 26); and

(B) not exempt from tax under chapter 52 of Title 26 at the time of their removal under that chapter or the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202).

(3) Market share

The term "market share" means the share of each manufacturer or importer of a class of tobacco product (expressed as a decimal to the fourth place) of the total volume of domestic sales of the class of tobacco product during the base period for a fiscal year for an assessment under this section.

(b) Quarterly assessments

(1) Imposition of assessment

The Secretary, acting through the Commodity Credit Corporation, shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

(2) Amounts

Beginning with the calendar quarter ending on December 31 of each of fiscal years 2005 through 2014, the assessment payments over each four-calendar quarter period shall be sufficient to cover--

(A) the contract payments made under sections 518a and 518b of this title during that period; and

(B) other expenditures from the Tobacco Trust Fund made during the base quarter periods corresponding to the four calendar quarters of that period.

(3) Deposit

Assessments collected under this section shall be deposited in the Tobacco Trust Fund.

(c) Assessments for classes of tobacco products

(1) Initial allocation

The percentage of the total amount required by subsection (b) of this section to be assessed against, and paid by, the

manufacturers and importers of each class of tobacco product in fiscal year 2005 shall be as follows:

(A) For cigarette manufacturers and importers, 96.331 percent.

(B) For cigar manufacturers and importers, 2.783 percent.

(C) For snuff manufacturers and importers, 0.539 percent.

(D) For roll-your-own tobacco manufacturers and importers, 0.171 percent.

(E) For chewing tobacco manufacturers and importers, 0.111 percent.

(F) For pipe tobacco manufacturers and importers, 0.066 percent.

(2) Subsequent allocations

For subsequent fiscal years, the Secretary shall periodically adjust the percentage of the total amount required under subsection (b) of this section to be assessed against, and paid by, the manufacturers and importers of each class of tobacco product specified in paragraph (1) to reflect changes in the share of gross domestic volume held by that class of tobacco product.

(3) Effect of insufficient amounts

If the Secretary determines that the assessment imposed under subsection (b) of this section will result in insufficient amounts to carry out this subchapter during a fiscal year, the Secretary shall assess such additional amounts as the Secretary determines to be necessary to carry out this subchapter during that fiscal year. The

additional amount shall be allocated to manufacturers and importers of each class of tobacco product specified in paragraph (1) in the same manner and based on the same percentages applicable under paragraph (1) or (2) for that fiscal year.

(d) Notification and timing of assessments

(1) Notification of assessments

The Secretary shall provide each manufacturer or importer subject to an assessment under subsection (b) of this section with written notice setting forth the amount to be assessed against the manufacturer or importer for each quarterly payment period. The notice for a quarterly period shall be provided not later than 30 days before the date payment is due under paragraph (3).

(2) Content

The notice shall include the following information with respect to the quarterly period used by the Secretary in calculating the amount:

(A) The total combined assessment for all manufacturers and importers of tobacco products.

(B) The total assessment with respect to the class of tobacco products manufactured or imported by the manufacturer or importer.

(C) Any adjustments to the percentage allocations among the classes of tobacco products made pursuant to paragraph (2) or (3) of subsection (c) of this section.

(D) The volume of gross sales of the applicable class of tobacco product treated as made by the manufacturer or

importer for purposes of calculating the manufacturer's or importer's market share under subsection (f) of this section.

(E) The total volume of gross sales of the applicable class of tobacco product that the Secretary treated as made by all manufacturers and importers for purposes of calculating the manufacturer's or importer's market share under subsection (f) of this section.

(F) The manufacturer's or importer's market share of the applicable class of tobacco product, as determined by the Secretary under subsection (f) of this section.

(G) The market share, as determined by the Secretary under subsection (f) of this section, of each other manufacturer and importer, for each applicable class of tobacco product.

(3) Timing of assessment payments

(A) Collection date

Assessments shall be collected at the end of each calendar year quarter, except that the Secretary shall ensure that the final assessment due under this section is collected not later than September 30, 2014.

(B) Base period quarter

The assessment for a calendar year quarter shall correspond to the base period quarter that ended at the end of the preceding calendar year quarter.

(e) Allocation of assessment within each class of tobacco product

(1) Pro rata basis

The assessment for each class of tobacco product specified in subsection (c)(1) of this section shall be allocated on a pro rata basis among manufacturers and importers based on each manufacturer's or importer's share of gross domestic volume.

(2) Limitation

No manufacturer or importer shall be required to pay an assessment that is based on a share that is in excess of the manufacturer's or importer's share of domestic volume.

(f) Allocation of total assessments by market share

The amount of the assessment for each class of tobacco product specified in subsection (c)(1) of this section to be paid by each manufacturer or importer of that class of tobacco product shall be determined for each quarterly payment period by multiplying--

(1) the market share of the manufacturer or importer, as calculated with respect to that payment period, of the class of tobacco product; by

(2) the total amount of the assessment for that quarterly payment period under subsection (c) of this section, for the class of tobacco product.

(g) Determination of volume of domestic sales

(1) In general

The calculation of the volume of domestic sales of a class of tobacco product by a manufacturer or importer, and by all manufacturers and importers as a group, shall be made

by the Secretary based on information provided by the manufacturers and importers pursuant to subsection (h) of this section, as well as any other relevant information provided to or obtained by the Secretary.

(2) Gross domestic volume

The volume of domestic sales shall be calculated based on gross domestic volume.

(3) Measurement

For purposes of the calculations under this subsection and the certifications under subsection (h) of this section by the Secretary, the volumes of domestic sales shall be measured by--

(A) in the case of cigarettes and cigars, the number of cigarettes and cigars; and

(B) in the case of the other classes of tobacco products specified in subsection (c)(1) of this section, in terms of number of pounds, or fraction thereof, of those products.

(h) Measurement of volume of domestic sales

(1) Submission of information

Each manufacturer and importer of tobacco products shall submit to the Secretary a certified copy of each of the returns or forms described by paragraph (2) that are required to be filed with a Federal agency on the same date that those returns or forms are filed, or required to be filed, with the agency.

(2) Returns and forms

The returns and forms described by this paragraph are those returns and forms that relate to--

(A) the removal of tobacco products into domestic commerce (as defined by section 5702 of Title 26); and

(B) the payment of the taxes imposed under charter [FN2] 52 of Title 26, including AFT Form 5000.24 and United States Customs Form 7501 under currently applicable regulations.

(3) Effect of failure to provide required information

Any person that knowingly fails to provide information required under this subsection or that provides false information under this subsection shall be subject to the penalties described in section 1003 of Title 18. The Secretary may also assess against the person a civil penalty in an amount not to exceed two percent of the value of the kind of tobacco products manufactured or imported by the person during the fiscal year in which the violation occurred, as determined by the Secretary.

(i) Challenge to assessment

(1) Appeal to Secretary

A manufacturer or importer subject to this section may contest an assessment imposed on the manufacturer or importer under this section by notifying the Secretary, not later than 30 business days after receiving the assessment notification required by subsection (d) of this section, that the manufacturer or importer intends to contest the assessment.

(2) Information

Not later than 180 days after October 22, 2004, the Secretary shall establish by regulation a procedure under which a manufacturer or importer contesting an assessment under this subsection may present information to the Secretary to demonstrate that the assessment applicable to the manufacturer or importer is incorrect. In challenging the assessment, the manufacturer or importer may use any information that is available, including third party data on industry or individual company sales volumes.

(3) Revision

If a manufacturer or importer establishes that the initial determination of the amount of an assessment is incorrect, the Secretary shall revise the amount of the assessment so that the manufacturer or importer is required to pay only the amount correctly determined.

(4) Time for review

Not later than 30 days after receiving notice from a manufacturer or importer under paragraph (1), the Secretary shall--

(A) decide whether the information provided to the Secretary under paragraph (2), and any other information that the Secretary determines is appropriate, is sufficient to establish that the original assessment was incorrect; and

(B) make any revisions necessary to ensure that each manufacturer and importer pays only its correct pro rata share of total gross domestic volume from all sources.

(5) Immediate payment of undisputed amounts

The regulations promulgated by the Secretary under paragraph (2) shall provide for the immediate payment by a manufacturer or importer challenging an assessment of that portion of the assessment that is not in dispute. The manufacturer and importer may place into escrow, in accordance with such regulations, only the portion of the assessment being challenged in good faith pending final determination of the claim.

(j) Judicial review

(1) In general

Any manufacturer or importer aggrieved by a determination of the Secretary with respect to the amount of any assessment may seek review of the determination in the United States District Court for the District of Columbia or for the district in which the manufacturer or importer resides or has its principal place of business at any time following exhaustion of the administrative remedies available under subsection (i) of this section.

(2) Time limits

Administrative remedies shall be deemed exhausted if no decision by the Secretary is made within the time limits established under subsection (i)(4) of this section.

(3) Excessive assessments

The court shall restrain collection of the excessive portion of any assessment or order a refund of excessive assessments already paid, along with interest calculated at the rate prescribed in section 3717 of Title 31, if it finds that the Secretary's determination is not supported by a

preponderance of the information available to the Secretary.

(k) Termination date

The authority provided by this section to impose assessments terminates on September 30, 2014.

§ 518e. Tobacco Trust Fund

(a) Establishment

There is established in the Commodity Credit Corporation a revolving trust fund, to be known as the "Tobacco Trust Fund", which shall be used in carrying out this subchapter. The Tobacco Trust Fund shall consist of the following:

(1) Assessments collected under section 518d of this title.

(2) Such amounts as are necessary from the Commodity Credit Corporation.

(3) Any interest earned on investment of amounts in the Tobacco Trust Fund under subsection (c) of this section.

(b) Expenditures

(1) Authorized expenditures

Subject to paragraph (2), and notwithstanding any other provision of law, the Secretary shall use amounts in the Tobacco Trust Fund, in such amounts as the Secretary determines are necessary--

(A) to make payments under sections 518a and 518b of this title;

(B) to provide reimbursement under section 519(c) of this title;

(C) to reimburse the Commodity Credit Corporation for costs incurred by the Commodity Credit Corporation under paragraph (2); and

(D) to make payments to financial institutions to satisfy contractual obligations under section 518a or 518b of this title.

(2) Expenditures by commodity credit corporation

Notwithstanding any other provision of law, the Secretary shall use the funds, facilities, and authorities of the Commodity Credit Corporation to make payments described in paragraph (1). Not later than January 1, 2015, the Secretary shall use amounts in the Tobacco Trust Fund to fully reimburse, with interest, the Commodity Credit Corporation for all funds of the Commodity Credit Corporation expended under the authority of this paragraph. Administrative costs incurred by the Secretary or the Commodity Credit Corporation to carry out this title may not be paid using amounts in the Tobacco Trust Fund.

(c) Investment of amounts

(1) In general

The Commodity Credit Corporation shall invest such portion of the amounts in the Tobacco Trust Fund as are not, in the judgment of the Commodity Credit Corporation, required to meet current expenditures.

(2) Interest-bearing obligations

Investments may be made only in interest-bearing obligations of the United States.

(3) Acquisition of obligations

For the purpose of investments under paragraph (1), obligations may be acquired--

(A) on original issue at the issue price; or

(B) by purchase of outstanding obligations at the market price.

(4) Sale of obligations

Any obligation acquired by the Tobacco Trust Fund may be sold by the Commodity Credit Corporation at the market price.

(5) Credits to fund

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Tobacco Trust Fund shall be credited to and form a part of the Fund.

§ 518f. Limitation on total expenditures

The total amount expended by the Secretary from the Tobacco Trust Fund to make payments under sections 518a and 518b of this title and for the other authorized purposes of the Fund shall not exceed $10,140,000,000.

APPENDIX D

UNITED STATES DEPARTMENT DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA JACKSONVILLE
DIVISION

SWISHER INTERNATIONAL, INC.,

Plantiff, No. 305-CV-J-16-TEM

v. **STIPULATED FACTS**

MIKE JOHANNS,
Secretary of Agriculture,

Defendant.

1. Swisher International Inc. ("Swisher") is a corporation, duly incorporated under the laws of Delaware, with its principal operations located in Jacksonville, Florida.

2. Swisher is primarily a manufacturer of small and large cigars, and it also produces some smokeless tobacco products.

3. Mike Johanns is the United States Secretary of Agriculture.

4. The Commodity Credit Corporation ("CCC") is an agency and instrumentality of the United States within the Department of Agriculture ("USDA").

5. The initial allocation of assessments among the classes of tobacco products that is set forth for fiscal year 2005 in the 2004 Act used the maximum applicable excise rate for each class, not the actual excise tax rate paid by a manufacturer, applicable to a class of tobacco products.

6. All tobacco products referenced in the 2004 Act, other than large cigars, have a non-variable excise tax rate.

7. Because the excise tax rate for large cigars is variable, the "maximum" rate may not reflect the actual rate paid by manufacturers and importers of large cigars.

8. For fiscal year 2006, CCC has allocated assessments among product classes by multiplying net tobacco products removed (sold) by the maximum excise tax rate for each type of tobacco.

9. For fiscal year 2006, CCC has calculated that the cigar class share of overall assessments is 3.0442%.

10. For fiscal year 2007, CCC estimates, based on available maximum excise tax data, that the cigar class share of overall assessments will be 3.2846%.

11. Because the "maximum" rate will not reflect the actual rate paid by at least some manufacturers and importers of large cigars, the aggregate actual excise taxes paid by all cigar manufacturers and importers during a given period is less than the aggregate maximum excise taxes applicable to such cigar manufacturers' and importers' products sold during the same period.

12. USDA estimates, based on available data, that if the inter-class allocation for fiscal year 2007 were performed based on actual excise taxes, rather than maximum excise taxes, then the cigar class allocation would be approximately 27% smaller approximately 2.3891% rather than 3.2846%.

13. In 1999, a total of 1,248,900,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher

purchased 238,212 pounds of quota tobacco -- or .019% of the total - for use in its Cigars.

14. In 2000, a total of 948,300,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 280,634 pounds of quota tobacco - or .029% of the total- for use in its Cigars.

15. In 2001, a total of 944,800,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 262,106 pounds of quota tobacco - or .028% of the total- for use in its cigars.

16. In 2002, a total of 914,700,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 283,448 pounds of quota tobacco - or .031% of the total- for use in its cigars.

17. In 2003, a total of 829,500,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 348,620 pounds of quota tobacco - or .042% of the total- for use in its cigars.

18. In 2004, a total of 831 ,900,000 pounds of quota tobacco were sold through the quota program. During that year, according to data produced by Swisher, Swisher purchased 280,920 pounds of quota tobacco - or .034% of the total- for use in its cigars.

19. Several of the cigar-type tobaccos that Swisher purchased in 2001, 2002, and 2003 were disapproved and discontinued, and therefore not subject to the quota system.

20. Swisher has never been asked by USDA to submit a statement of its purchasing intentions.

21. Generally, small cigars are less expensive per unit than large cigars.

Dated: May 16, 2006
Tampa, Florida

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No. 08-1361

In the Supreme Court of the United States

SWISHER INTERNATIONAL, INC., PETITIONER

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Fair and Equitable Tobacco Reform Act of 2004, which imposes monetary assessments on current tobacco manufacturers and tobacco product importers to finance the phase-out of federal tobacco quota and price-support programs, violates the Due Process Clause or the Just Compensation Clause of the Fifth Amendment.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 550 F.3d 1046. The order of the district court (Pet. App. 33a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2008. On February 17, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 2, 2009, and the petition was filed on May 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until 2004, tobacco farmers were for decades subject to a comprehensive system of federal production quotas and price controls. Under the Agricultural Ad-

justment Act of 1938, the Department of Agriculture assigned quotas and allotments limiting the amount of tobacco that farmers could bring to market without penalty. See 7 U.S.C. 1311 *et seq.* (2000) (repealed 2004). Subsequent legislation added a system of price supports that guaranteed a minimum price to tobacco farmers for their crops. See 7 U.S.C. 1445 to 1445-2 (2000) (repealed 2004).

Congress ultimately concluded, however, that the quota and price-support systems had outlived their purpose. As one court explained, "tobacco quotas and price supports often worked at cross-purposes. Artificially high prices dampened demand for domestic tobacco and led to reduced quotas. Along with many other factors, this contributed to a worsening financial situation among the members of the tobacco farming community." *State* v. *Philip Morris USA Inc.*, 618 S.E.2d 219, 220 (N.C. 2005). Congress became concerned that tobacco farmers and their rural communities were facing economic disaster, threatening the long-term viability of the United States tobacco industry. See generally *The Necessity of a Tobacco Quota Buyout: Why It Is Crucial to Rural Communities and the U.S. Tobacco Industry: Hearing Before the Subcomm. on Production & Price Competitiveness of the Senate Comm. on Agriculture, Nutrition & Forestry*, 108th Cong., 2d Sess. 2 (2004).

Congress responded by enacting the Fair and Equitable Tobacco Reform Act of 2004 (FETRA), Pub. L. No. 108-357, Tit. VI, 118 Stat. 1522, which repealed the tobacco quota and price-support programs. See FETRA §§ 611-612, 118 Stat. 1522-1524. Congress did not, however, simply terminate decades of government market controls overnight. Rather, to minimize disruption to

the tobacco industry and facilitate the transition to a free-market system, Congress created a ten-year Tobacco Transition Payment Program. Under that transitional program, the Commodity Credit Corporation (CCC), a government corporation, makes payments to owners of farms that had an established marketing quota at the time of FETRA's enactment and to persons who were engaged in the production of tobacco in 2002, 2003, or 2004. 7 U.S.C. 518a(a), 518b(a) and (d)(3), 518e.

To reimburse the CCC for these transitional support payments, Congress created the Tobacco Trust Fund, which is administered by the Secretary of Agriculture and funded by quarterly assessments on current manufacturers and importers of tobacco products. 7 U.S.C. 518d(b), 518e(a). FETRA provides:

> The Secretary, acting through the [CCC], shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

7 U.S.C. 518d(b)(1). The statute further specifies that the quarterly assessment for each manufacturer or importer shall be based on the class of tobacco product it sells (cigarettes, cigars, chewing tobacco, etc.), in proportion to the company's domestic market share for products of that class, as defined in the statute. Pet. App. 3a-4a; see 7 U.S.C. 518d(c) and (f); see also 7 C.F.R. Pt. 1463, Subpt. A.

2. Petitioner is a domestic manufacturer of small and large cigars and other tobacco products. Pet. App. 34a. In the first year of the transitional payment pro-

gram, petitioner was required to pay approximately $11 million into the Tobacco Trust Fund based on petitioner's share of the domestic tobacco market. *Id.* at 4a. Petitioner claims that its total obligation to the trust fund will exceed $100 million over the ten-year life of the transitional program. *Ibid.*

Petitioner brought this action against the Secretary in the United States District Court for the Middle District of Florida.[1] Petitioner sought relief from its payment obligations, claiming that the assessments authorized by Congress unlawfully take petitioner's property without just compensation and violate principles of substantive due process and equal protection.

The district court granted summary judgment to the government with regard to each of plaintiff's constitutional challenges. Pet. App. 33a-70a. First, the district court rejected petitioner's taking claim because, with narrow exceptions not present here, "a government-imposed payment of money cannot result in a compensable taking." *Id.* at 53a (quoting *Commonwealth Edison Co.* v. *United States*, 46 Fed. Cl. 29, 41 (2000), aff'd, 271 F.3d 1327 (Fed. Cir. 2001), cert. denied, 535 U.S. 1096 (2002)). Second, the court rejected petitioner's substantive due process claim, holding that even if petitioner were correct that FETRA operated retrospectively—which the court did not decide—Congress had acted rationally and in furtherance of a legitimate legislative goal in establishing a transitional payment program financed by assessments on current tobacco manufacturers and importers. *Id.* at 60a-62a. The court also rejected petitioner's claim that the assessment scheme

[1] Petitioner invoked FETRA's judicial-review provision, 7 U.S.C. 518d(j)(1), as the basis for suing in the district court rather than the Court of Federal Claims.

lacked a rational basis and therefore violated the equal protection component of the Due Process Clause. *Id.* at 62a-69a.

3. The court of appeals affirmed. Pet. App. 1a-23a.

a. The court of appeals first explained that the Just Compensation Clause "is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest." Pet. App. 14a. The court rejected petitioner's reliance on the plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), in which four Justices concluded that the severe retroactive liability imposed under the Coal Act constituted an unconstitutional taking without just compensation under the circumstances of that case. See *id.* at 537-538. As the court explained, five Justices in *Eastern Enterprises* expressly concluded that "the Takings Clause does *not* apply where there is a mere general liability * * * and where the challenge seeks to invalidate the statute rather than merely seek[] compensation for an otherwise proper taking." Pet. App. 16a (emphasis added) (citing *Eastern Enterprises*, 524 U.S. at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting)). Because the assessments under FETRA represent nothing more than a congressionally imposed, general monetary obligation to the government, the court concluded, "it would be inappropriate in this case to apply a takings analysis." *Ibid.*

In any event, the court of appeals stressed, the assessments that petitioner is required to pay under FETRA are wholly unlike the liability at issue in *Eastern Enterprises*, which was a "retroactive obligation 'of unprecedented scope.'" Pet. App. 17a (quoting *Eastern Enterprises*, 524 U.S. at 549 (plurality opinion)). In-

deed, the court stated, a "crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon [petitioner] * * * is not retroactive." *Ibid.* FETRA monetary assessments are imposed only on current participants in the domestic tobacco market, the court explained, and only in proportion to their current market share. *Id.* at 18a. Because this case involves none of the retroactive effect that was the linchpin of the plurality's takings analysis in *Eastern Enterprises*, the court stated that it "strongly suspect[ed] that [it] would reach the same result," and reject petitioner's taking claim, even under "the takings analysis described in Justice O'Connor's [plurality] opinion" in *Eastern Enterprises*. *Id.* at 20a n.12.

b. The court of appeals next held that the FETRA assessments do not violate principles of substantive due process. "Stripped of its argument that the Act is retroactive," the court concluded, "[petitioner's] due process challenge is readily disposed of as being wholly without merit." Pet. App. 18a. The court observed that "[t]he legitimate legislative purpose" in eliminating federal market quotas and price supports for tobacco is "apparent." *Id.* at 19a. Moreover, the court reasoned, Congress rationally chose to finance this program by imposing an assessment on current tobacco manufacturers and importers—the entities most likely to benefit from deregulation of tobacco farming and the corresponding reduction in prices for raw tobacco. *Ibid.* Finally, the court concluded that the methodology specified by Congress for calculating assessments under FETRA does

not violate petitioner's equal protection rights. *Id.* at 21a-22a.[2]

c. Judge Cox concurred in part and in the judgment. Pet. App. 23a. He joined the court's rejection of petitioner's due process and equal protection claims, and he agreed that FETRA "does not violate the Takings Clause." *Ibid.*

ARGUMENT

The court of appeals correctly held that FETRA does not violate the Due Process Clause or the Just Compensation Clause of the Fifth Amendment. That conclusion does not conflict with any decision of this Court or any other court of appeals. As the courts below recognized, FETRA imposes an ordinary requirement to pay money (*i.e.*, a tax) on current participants in a regulated industry, in proportion to their participation in the industry, to fund a federal program that Congress deemed essential to the health of that industry. That scheme reflects an entirely rational legislative judgment and imposes no retroactive liability of the kind at issue in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), on which petitioner relies. Furthermore, although petitioner identifies a minor degree of disagreement among the circuits concerning the proper interpretation of this Court's decision in *Eastern Enterprises*, this case does not impli-

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[2] The court also rejected petitioner's equal protection challenge to the methodology specified by Congress for calculating assessments under FETRA. Pet. App. 21a-22a. Petitioner does not renew that challenge here. In addition, although petitioner initially brought a claim under the Administrative Procedure Act to challenge the Department of Agriculture's regulations implementing FETRA, it abandoned that claim in the district court. *Id.* at 46a.

cate that disagreement. Further review is not warranted.

A. The Decision Below Is Correct

1. The court of appeals correctly held that FETRA is rationally related to legitimate government ends and does not violate substantive due process. FETRA repealed a decades-old system of quotas and price supports that Congress concluded had not only outlived its purpose, but also posed a threat to the long-term viability of the entire domestic tobacco industry. At the same time, Congress recognized that it could not simply terminate federal market controls overnight: thousands of tobacco farmers had organized their operations for decades based on the existence of those controls, and Congress rationally concluded that a temporary, transitional program of support payments was warranted to avoid needless hardship and permit farmers to adjust to the rigors of the free market. See 7 U.S.C. 518 *et seq.*; 150 Cong. Rec. H8716-H8718 (daily ed. Oct. 7, 2004) (statements of Reps. Burr, McIntyre, and Lewis of Ky.). Petitioner acknowledges that that program rested on a "rational and legitimate" purpose. Pet. 23.

To finance the program, Congress imposed a temporary monetary assessment—in effect, a tax with a sunset provision—on all tobacco manufacturers and importers who sell products in the domestic market in any given year during the ten-year transition period. The assessments are levied only on current participants in the domestic tobacco market, see 7 U.S.C. 518d(b)(1) (authorizing annual assessments on each company "that sells tobacco products in domestic commerce in the United States during that fiscal year"), and only in proportion

to each participant's domestic market share during the year in question, see 7 U.S.C. 518d(e) and (f).

Congress's decision to require tobacco manufacturers and importers to finance the deregulation of tobacco farming reflects its recognition that it was those companies—*i.e.*, those for whom raw tobacco is a principal input—that stood to benefit from the elimination of market quotas and price supports and the corresponding decrease in the price of tobacco. Pet. App. 19a; accord, *e.g.*, *State* v. *Philip Morris USA Inc.*, 618 S.E.2d 219, 223 (N.C. 2005). Indeed, as the court of appeals observed, "tobacco manufacturers and importers currently engaged in the domestic market are entities that are not only likely to benefit from the deregulation, but also are entities best suited to pass such increased costs [*i.e.*, the FETRA assessments] along to the ultimate consumers." Pet. App. 19a. Moreover, given that all tobacco products compete with each other for consumer dollars, it was reasonable for Congress to spread the burden over all participants in the domestic tobacco market in proportion to their share of the market.

Although petitioner contended below that FETRA should be struck down "because it imposes retroactive liability," Pet. App. 17a; see, *e.g.*, Pet. C.A. Br. 28, petitioner now reverses course and criticizes the court of appeals for a "talismanic focus on 'retroactivity.'" Pet. 10. Instead, petitioner now appears to suggest (Pet. 10, 20, 21) that applying the assessment to its operations violates a "proportionality" principle that petitioner asserts is implicit in the Due Process Clause, on the theory that there is only a "tenuous" connection between its operations and the former tobacco-quota system. But petitioner has acknowledged that it participated in that quota system. See, *e.g.*, Pet. App. 43a & n.10. Petitioner

suggests that its tobacco needs were different, but Congress was not constitutionally required to distinguish between, *e.g.*, air-cured tobacco and other types of tobacco (see Pet. 5). Cf., *e.g.*, *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 272, (1979) ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."). And in any event, Congress could rationally conclude that the market for tobacco, generally, is sufficiently interconnected that petitioner may well benefit from the end of price supports. See Pet. App. 44a. Furthermore, the assessment does not impose disproportionate liability on cigar manufacturers like petitioner, but takes account of their relatively small share of "gross domestic volume." 7 U.S.C. 518d(c)(1)(B) and (2). Unlike the plaintiff in *Eastern Enterprises*, petitioner has not withdrawn from the industry or terminated any nexus with the domestic tobacco market; if it did, it would no longer be subject to an assessment. See 7 U.S.C. 518d(e) and (f). There is, in short, no merit to petitioner's contention (Pet. 21) that the application of the assessment to companies like it is so irrational as to be "worse than 'retroactive.'"

The court of appeals thus correctly held that FETRA does not violate the Fifth Amendment guarantee of due process. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Congress concluded that it was necessary for the health of the entire tobacco industry to wean tobacco farmers

from federal price controls, and for that purpose imposed a temporary tax on the entities that participate in the active market for tobacco products and also are categorically most likely to benefit from the deregulation of tobacco farming. Pet. App. 19a. That is plainly a rational means of accomplishing a concededly legitimate end, and petitioner identifies no valid basis on which to set aside Congress's legislative judgment.

2. a. Petitioner contends that the court of appeals erred in declining to analyze FETRA's assessments under the Just Compensation Clause. But the mere imposition of an obligation to pay money, without more, does not trigger analysis under the Just Compensation Clause. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 & n.9 (1989) (rejecting per se takings analysis and holding that assessment on awards by an international tribunal "does not qualify as a 'taking'"). Most recently, five Justices adhered to that position in *Eastern Enterprises*. See 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part) ("an obligation to perform an act, the payment of benefits," is not a "taking"); *id.* at 554 (Breyer, J., dissenting) ("an ordinary liability to pay money" does not give rise to a taking).

As this Court recognized in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), a contrary rule would subject a broad variety of everyday economic legislation—such as taxes, minimum wage laws, and new legal causes of action—to takings analysis. *Id.* at 222-223. Congress has imposed myriad taxes, fees, and assessments in pursuance of its constitutional authority to "lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. Art. I, § 8, Cl. 1, and this Court has never suggested that those exactions are subject to challenge under the Just Compensation Clause merely because

they require the payment of money to the government, or because money collected in taxes from one citizen is expended to benefit another. See *Connolly*, 475 U.S. at 223 ("Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."); accord *id.* at 228 (O'Connor, J., concurring).

The court of appeals thus correctly concluded that "takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest." Pet. App. 14a. Accord, *e.g.*, *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (en banc) ("[T]he mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment."), cert. denied, 535 U.S. 1096 (2002); *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 659 (3d Cir.), cert. denied, 528 U.S. 963 (1999); *Parella* v. *Retirement Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999); *Swisher Int'l, Inc.* v. *United States*, 178 F. Supp. 2d 1354, 1362 (Ct. Int'l Trade 2001), aff'd, 315 F.3d 1332 (Fed. Cir.), cert. denied, 539 U.S. 942 (2003).

The FETRA assessment scheme that petitioner challenges, like any other federal tax or fee, involves just such an ordinary obligation to pay money to the government. Pet. App. 12a. Indeed, as petitioner appears to recognize (Pet. 23), Congress could have funded the Tobacco Transition Payment Program through an increase in the federal excise tax for tobacco products.[3] That

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[3] Petitioner's suggestion that an increase in the excise tax would have been generated political opposition, Pet. 23, has no bearing on

Congress elected to fund the program through a monetary assessment on manufactures and importers that is paid into a special statutory trust fund, rather than an excise tax paid into the general Treasury, does not transform otherwise permissible revenue legislation into an unconstitutional taking. Cf. *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 562-563 (2005).

Petitioner identifies no decision of this Court invalidating such a scheme under the Just Compensation Clause. Petitioner relies principally on Justice O'Connor's plurality opinion in *Eastern Enterprises*, which concluded that the "disproportionate and severely retroactive" liability imposed by the Coal Act on a corporation that was no longer involved in the industry constituted an impermissible taking. 524 U.S. at 536; see generally *id.* at 522-538 (plurality opinion). But as the court of appeals recognized, five Justices in *Eastern Enterprises* concluded that the monetary assessment scheme in that case was *not* properly analyzed under the Just Compensation Clause. Pet. App. 16a; see 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part) ("Until today * * * one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."); *id.* at 554 (Breyer, J., dissenting) (explaining that takings analysis was inappropriate because the suit involved "not an in-

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whether FETRA constitutes an uncompensated taking. Nor is it clear why petitioner believes that FETRA's monetary assessments "circumvent[ed] the orderly lawmaking process." Pet. 22. The assessment system is set out clearly in the statute, which originated in the House of Representatives, passed both Houses of Congress, and was signed by the President. No more orderly lawmaking process was required.

terest in physical or intellectual property, but an ordinary liability to pay money").

This Court's decision in *Norwood* v. *Baker*, 172 U.S. 269 (1898), on which petitioner also relies (Pet. 14), is inapposite. In that case, the village of Norwood condemned a strip from the middle of Baker's lot, paid her compensation of $2000, but then assessed her (ostensibly as the owner of the land abutting the condemned strip) $2218 to recover the costs of the condemnation. See 172 U.S. at 274-277. There was no doubt that property (real property, not money) had been taken; the issue was whether the village could circumvent its obligation *to pay compensation* for that taking by assessing the owner for a sum exceeding the condemnation value, "irrespective of any peculiar benefits accruing to the owner from such improvement." *Id.* at 279.[4]

At most, petitioner can point to a handful of decisions in which this Court found that the imposition of monetary liability was not a taking, after applying the three-factor inquiry often used to determine whether a regulation amounts to a regulatory taking. See *Connolly*, 475 U.S. at 224-227; see also *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-646 (1993); cf. *Bowen* v. *Gilliard*, 483 U.S. 587,

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[4] Nor would Justice Scalia's dissenting opinion in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), help petitioner even if Justice Scalia's view had commanded a majority of the Court. Contrary to petitioner's reading (see Pet. 19), Justice Scalia affirmatively stated that the city could tax landlords and distribute the proceeds to pay rent for needy tenants—a structure directly analogous to the one at issue here. 485 U.S. at 22. Justice Scalia objected to achieving the same end through a price control; he did not opine that the Just Compensation Clause requires all taxes to be broad-based. In any event, the Court did not consider the Just Compensation Clause challenge in that case. See *id.* at 15 (majority opinion).

606-609 (1987) (finding no taking where a federal statute required, as a condition of eligibility for welfare benefits, that any entitlement to child-support payments be prospectively reassigned from the beneficiary child to the custodial parent for the benefit of the entire household). But those decisions do *not* establish the rule that petitioner seeks—that a general monetary assessment, standing alone, may be blocked as an uncompensated taking.

b. As the court below recognized, Pet. App. 13a n.6, this Court has analyzed a requirement to pay money under takings principles only when the government has invaded a discrete, identifiable property interest, such as a legal right to collect interest payments. *E.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998) (interest income generated by funds in a specific, consolidated lawyers' trust account); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980) (interest generated from specific, consolidated interpleader account); see *Eastern Enterprises*, 524 U.S. at 555 (Breyer, J., dissenting).

Petitioner objects that the distinction drawn in this Court's decisions between ordinary monetary liabilities and the invasion of discrete property interests is unsound because money is fungible. Pet. 15 n.7. But as the Court recognized in *Connolly*, extending the Just Compensation Clause to encompass any legal obligation to pay money would "prove too much." 475 U.S. at 222-223. The gravamen of the Just Compensation Clause is property, not monetary liability. See *Eastern Enterprises*, 524 U.S. at 541, 544 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting). FETRA does not invade any discrete property interest of petitioner's, but merely

requires the payment of money to the government. The statute "is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part). The court of appeals correctly held that such an obligation does not implicate the Just Compensation Clause.

3. In any event, petitioner's claim would fail even under the terms of the plurality opinion in *Eastern Enterprises*, as the court of appeals recognized. Pet. App. 20a n.12. FETRA's assessment scheme involves nothing like the "severe, disproportionate, and extremely retroactive" liability that the plurality in *Eastern Enterprises* stressed in finding that the Coal Act effected an unconstitutional taking. 524 U.S. at 538. Eastern Enterprises was allocated millions of dollars in liability based on conduct that had terminated decades before the enactment of the legislation. See *id.* at 530-531. That extraordinary retroactive effect was essential to the plurality's reasoning under the Just Compensation Clause, as well as to Justice Kennedy's conclusion that the Act violated fundamental principles of due process. Compare, *e.g.*, *id.* at 528-529 (analyzing the Coal Act as a taking because it "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience"), with *id.* at 529 (Kennedy, J., concurring in the judgment and dissenting in part) (reasoning that "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity").

FETRA implicates none of the same concerns. The annual assessments are levied only on current partici-

pants in the domestic tobacco market, see 7 U.S.C. 518d(b)(1), and only in proportion to their market share during the year in question, 7 U.S.C. 518d(e) and (f). As the court of appeals recognized, "[t]he crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon [petitioner] in the instant case is not retroactive." Pet. App. 17a. If petitioner ceased manufacturing tobacco products tomorrow, it would have no further obligation to the trust fund; by the same token, if a new manufacturer entered the domestic tobacco market tomorrow, it would be required to pay the FETRA assessment "as a cost of doing business in the industry." *Id.* at 18a. Because petitioner's obligations under FETRA are based solely on its present participation in the domestic tobacco industry, the concerns that animated the plurality's takings analysis in *Eastern Enterprises* are not present here. And petitioner does not seriously contend otherwise, having abandoned its previous assertions that FETRA is "retroactive." See p. 9, *supra*.

B. The Decision Below Does Not Implicate The Minor Disagreement Among The Circuits Concerning The Precedential Effect Of *Eastern Enterprises*

Petitioner wrongly contends that this Court's review is warranted because the circuits are split over the precedential effect of this Court's decision in *Eastern Enterprises*. The minor disagreement that petitioner identifies is not implicated by the decision below, which is correct regardless of which opinion in *Eastern Enterprises* controls. Further review is not warranted.

In addition to the Eleventh Circuit's decision below, three circuits have held that, because no single rationale commanded the assent of a majority of the Court, *East-*

ern Enterprises does not provide a controlling rule that applies beyond the specific facts of that case. *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003), cert. denied, 540 U.S. 1103 (2004); *United States* v. *Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); see *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998) (concluding that no taking claim was presented and that *Eastern Enterprises* did not establish a precedential substantive due process holding); see also *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 552 & n.6 (6th Cir. 2001) (explaining that "*Eastern Enterprises* left unresolved whether a takings analysis applies in a case such as this," and rejecting the taking claim under the analysis of Justice O'Connor's opinion).[5] In contrast, three circuits have held that Justice Kennedy's concurrence in *Eastern Enterprises*, combined with Justice Breyer's dissenting opinion for four Justices, provides binding authority for the proposition that general monetary assessments are not cognizable under the Just Compensation Clause. *Commonwealth Edison Co.*, 271 F.3d at 1338-1339; *Unity Real Estate Co.*, 178 F.3d at 659; *Parella*, 173 F.3d at 58.

This case, however, does not implicate that disagreement: as already noted, see pp. 16-17, *supra*, *none* of the opinions in *Eastern Enterprises* articulated a rule that would allow petitioner to prevail here. The linchpin

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[5] Petitioner mistakenly contends (Pet. 12) that the Ninth Circuit has also so held, citing *Chevron USA, Inc.* v. *Bronster*, 363 F.3d 846, 852 (9th Cir. 2004), rev'd *sub nom. Lingle* v. *Chevron USA, Inc.*, 544 U.S. 528 (2005). The court of appeals in that case in fact concluded that the meaning of *Eastern Enterprises* was irrelevant to the regulatory-taking claim before the court. See *id.* at 851.

of both the plurality opinion and the concurrence in *Eastern Enterprises* was the extraordinary retroactivity of the liability imposed. And as petitioner now appears to recognize, FETRA imposes no such retroactive burden, either generally or as applied to petitioner. See p. 9, *supra*. Accordingly, the outcome here would be the same irrespective of which opinion in *Eastern Enterprises*, if any, has the status of a precedential holding of the Court. See Pet. App. 20a n.12 ("[W]e strongly suspect that we would reach the same result should we undertake the takings analysis described in Justice O'Connor's opinion."). This case accordingly does not provide a suitable vehicle for resolving the disagreement that petitioner identifies.

Indeed, petitioner fails to identify any decision of this Court or any court of appeals that is inconsistent with the decision below. The only decision that petitioner cites in which a court of appeals invalidated a monetary assessment under the Just Compensation Clause is *United States Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412, 420 (5th Cir. 2000), cert. denied, 532 U.S. 922 (2001) (*USF&G*). That case, however, involved the taking of "an identifiable property interest or fund," namely, a "specific fund of benefits." *Ibid.* That feature of *USF&G* brings it within the framework of such "identifiable fund" cases as *Webb's Fabulous Pharmacies*, which have no application here. See pp. 15-16, *supra*. *USF&G* also involved severely retroactive monetary assessments similar to those in *Eastern Enterprises*, and wholly unlike anything at issue in this case. See *USF&G*, 226 F.3d at 420 ("Act 188 as applied to plaintiffs' pre-enactment contracts retroactively imposes a heavy economic burden on those who could not reasonably anticipate the liability."). Petitioner identifies no

case in which this Court or any court of appeals has invalidated, as a violation of due process or the Just Compensation Clause, a monetary assessment imposed on *current* participants in a regulated industry in direct proportion to their participation, and we are aware of none. This Court's review accordingly is not warranted.

Equally unpersuasive is petitioner's contention (Pet. 13-14) that the decision below conflicts with various state court opinions suggesting that Just Compensation Clause analysis might be applied to monetary assessments imposed to offset the impact of land development. Unlike the FETRA assessments, the monetary assessments in those cases were inextricably tied to land-use regulations, and thus implicated traditional property interests in real estate. Moreover, the state courts in those cases regarded the assessments at issue not as ordinary monetary liabilities to the government, but rather as conditions imposed on the development of real property, and accordingly analyzed them under this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). See *Town of Flower Mound* v. *Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 624 (Tex. 2004); *Home Builders Ass'n* v. *City of Beavercreek*, 729 N.E.2d 349, 354-356 (Ohio 2000); *Northern Ill. Home Builders Ass'n* v. *County of Du Page*, 649 N.E.2d 384, 388-389 (Ill. 1995). Such decisions have no bearing on the decision below and therefore do not furnish a reason for the Court to review the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-1361

In the Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
Petitioner,

v.

TOM VILSACK,
Secretary of Agriculture,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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I. REVIEW IS WARRANTED TO SETTLE WIDESPREAD DISAGREEMENT REGARDING THE APPLICABILITY OF THE TAKINGS CLAUSE TO MONETARY ASSESSMENTS

Respondent begins by attempting to reframe the question as whether there is a conflict about the constitutionality *of FETRA*. Opp. 7 (the Eleventh Circuit's conclusion "that FETRA does not violate" the Constitution "does not conflict with any decision of . . . any other court of appeals"). Respondent undoubtedly appreciates, however, that the question warranting review is not whether *this particular statute* is constitutional, but whether, as the Eleventh Circuit and other courts have held, a government-imposed obligation to pay money is categorically beyond reach of the Takings Clause. There undeniably is a genuine and sharp split of authority on *that* important question. As the petition explains, the Eleventh Circuit's answer squarely conflicts with multiple decisions of this Court, of another court of appeals, and of several state courts of last resort. Moreover, there is no question that this sharp and widespread conflict has been fueled by disagreement about the precedential effect of this Court's splintered decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Unable to deny the existence of the palpable conflict on this issue, respondent resorts to minimizing its significance, asserting that the Eleventh Circuit's holding conflicts with a "handful" of this Court's decisions. Opp. 17. It is a significant handful. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (concluding that the

confiscation of escrow account interest is subject to Takings Clause review); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (applying Takings Clause analysis to AFDC eligibility requirement that included all family members' incomes); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (applying Takings Clause analysis to statute requiring that employer withdrawing from multiemployer pension plan must pay share of the plan's unfunded vested benefits); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (striking down as an unconstitutional taking the confiscation of interest on interpleader accounts); *see also Dane v. Jackson*, 256 U.S. 589, 599 (1921) (a state tax law will be held to conflict with the Fourteenth Amendment when "it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation"); *Brushaber v. Union Pacific R.R. Co.*, 240 U.S.1, 24-25 (1916) (similar); *Houck v. Little River Drainage District*, 239 U.S. 254, 275 (1915) (similar); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (applying the Takings Clause to strike down scheme imposing monetary assessments on adjacent landowners to fund the cost of building a new street). Ordinarily, the fact that a decision of a court of appeals conflicts with even one decision of this Court would be reason enough to grant review. *See* S. Ct. R. 10.

Moreover, still another "handful" of recent decisions by a sister court and several state courts of last resort conflict squarely with the Eleventh Circuit's conclusion (and those of other courts aligned with it) that monetary assessments are categorically beyond the purview of the Takings Clause. *See*

United States Fidelity & Guaranty Co. v. McKeithen, 226 F.3d 412 (5th Cir. 2000); *Smith v. Price Dev. Co.*, 125 P.3d 945 (Utah 2005); *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620 (Tex. 2004); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991). *But see McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008) (taking Eleventh Circuit approach); *accord Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995).

As Respondent concedes, this conflict can be traced in part to markedly divergent readings of *Apfel*, this Court's most recent word on the subject of the Takings Clause and monetary assessments. No fewer than ten courts of appeals have wrestled with how to interpret *Apfel*. Four circuits have concluded that *Apfel* held that monetary assessment schemes do not implicate the Takings Clause, while six other circuits have held that *Apfel* does not constitute binding precedent on the issue. Pet. 11-12 (collecting cases). That the lower courts are so perplexed regarding what constraints, if any, *Apfel* imposes is no "minor" matter. Rather, it is a compelling reason for this Court to grant review. *See Nichols v. United States*, 511 U.S. 738, 745-46 (1994) (that the effect of a splintered decision "has so obviously baffled and divided the lower courts that have considered it . . . is itself a reason for reexamining that decision").

Respondent's attempts to distinguish the raft of conflicting cases fall short. Respondent's reading of this Court's decision in *Norwood* is simply disingenuous. That case did not remotely turn on "whether the village could circumvent its obligation *to pay compensation*" for the condemnation of Baker's land. Opp. 14 (emphasis in original). While recognizing that the case "ar[o]s[e] out of the condemnation" of Baker's land – for which $2,000 had been found to be just compensation and paid – the Court made clear that the "particular question presented for consideration" involved the village's separate imposition of an assessment of condemnation expenses on property owners. 172 U.S. at 270-71, 275. The "judgment" of the Court was that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.* at 279. Justice Harlan's opinion nowhere implies, let alone states, that the Court's judgment turned on the fact that Baker was a condemnee.

Respondent's attempt to distinguish the Fifth Circuit's decision in *McKeithen* fares no better. The observation that the assessment scheme struck down in *McKeithen* was "retroactive," Opp. 19, merely ducks the point. Respondent cannot deny that *McKeithen* addressed and squarely rejected the notion that monetary assessment schemes are beyond the reach of the Takings Clause. *See* 226 F.3d at 416 (applying the three-factor *Penn Central* test and concluding that the statute at issue, which required insurance companies to contribute money to a

secondary workers' compensation fund, "unconstitutionally takes the plaintiffs' property" – *i.e.*, their money – "without just compensation"); *id.* at 420 (acknowledging but declining to adopt Justice Kennedy's view that measures imposing monetary obligations are beyond the reach of the Takings Clause).

Equally wide of the mark is Respondent's attempt to evade the significance of the decisions of several state courts of last resort holding that monetary obligations imposed to "offset" the impact of development are subject to Takings Clause scrutiny. Respondent contends that these cases are irrelevant because the exactions invalidated arose in the land-use context. Opp. 20. But Respondent does not deny that the "property" held to have been unconstitutionally taken in those cases was *money*. Nor could Respondent deny this Court's many cases establishing that real property is not the unique concern of the Takings Clause. *See, e.g., Ruckelshaus v. Monsanto,* 467 U.S. 986, 1002 (1984); *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685, 690 (1897); *Cincinnati v. Louisville & Nashville R.R.*, 223 U.S. 390, 400 (1912).

II. FETRA IS EXTRAORDINARY, NOT ORDINARY, LEGISLATION

Throughout its Opposition, Respondent strains to foster the misimpression that FETRA is "ordinary" legislation. But it is something altogether different.

Respondent repeatedly suggests that FETRA is insulated from Takings Clause scrutiny because it is a "tax." Opp. 8, 11, 12. Respondent made that argument below and lost. The district court

thoroughly analyzed and expressly rejected the contention that the Takings Clause does not apply because FETRA is a "tax." App. 46a-49a. Respondent abandoned that argument in the court of appeals, and with good reason: a law that transfers A's assets directly to B is not "'a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.'" *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213, 224 (1996).

Once it is revealed that FETRA is not a "tax," Respondent's argument that Swisher's Takings Clause claim "proves too much" because it would call into question "a broad variety of everyday economic legislation" including "taxes," Opp. 11, falls of its own weight. Indeed, the *reasons* why most taxes are not takings have no application to narrow *assessment* schemes like this one: tax measures "usually have the kind of general applicability that mutes the concerns behind takings jurisprudence. The broader the reach of a law, the less likely it is that a powerless segment of society is being unfairly singled out to bear a burden that society as a whole should bear." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 676 (3d Cir. 1999).

Rather than defend the constitutionality of the statute Congress enacted, Respondent focuses on what Congress "*could have*" done: "funded [payments to producers and quota holders] through an increase in the federal excise tax for tobacco products." Opp. 12 (emphasis added). But because Congress did *not* fund FETRA by raising excise taxes, this "adds up to little more than saying that, if my aunt were a man, she would be my uncle." *Florida v. Royer*, 460 U.S. 491, 528 (1983) (Rehnquist, J., dissenting).

Moreover, whether or not the hypothetical excise tax measure "could have" been enacted constitutionally, it is doubtful that such legislation ever would have passed. Legislation increasing excise taxes would not have triggered the $5.1 billion offset called for in the cigarette companies' global settlement agreement with the States. *See North Carolina v. Philip Morris USA Inc.*, 618 S.E.2d 219, 221-24 (N.C. 2005). Without the benefit of the offset, the cigarette lobby would not have supported federal "buyout" legislation. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) ("[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, [the] political processes can no longer be relied upon to prevent legislative abuse.").

And a hypothetical measure increasing excise taxes paid into the general Treasury would have required FETRA to compete head to head for those funds with other needed public projects. It is at best questionable that those who championed a tobacco buyout would have been equally satisfied by (or even supported) a measure that promised no more than a chance to "pull" and "haul," *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994), in the appropriations process for a share of the newly-raised funds.

Respondent asserts without analysis that Congress's decision to fund FETRA "through monetary assessments . . . rather than a tax paid into the general Treasury . . . does not transform an otherwise permissible revenue legislation into an unconstitutional taking." Opp. 13. Notably, the only case Respondent cites for this pivotal proposition, *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 50

(2005), is a First Amendment case that has nothing whatsoever to do with the issues presented here.

As Justice Scalia explained, there are fundamental differences between "off budget" approaches like FETRA and familiar taxing and spending legislation: "our government system has required [subsidies bestowed on a narrow group] to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident." *Pennell v. City of San Jose*, 485 U.S. 1, 22, 23 (1988) (Scalia, J., dissenting). Justice Scalia's opinion in *Pennell* is consistent with this Court's opinion last Term in *Polar Tankers, Inc. v. City of Valdez*, __ U.S. __, 129 S. Ct. 2277 (2009), in which the Court struck down a property tax that would have been permissible if assessed generally, rejecting claims that the government's failure to tax others was irrelevant. *See also, e.g., Minnesota v Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) (striking down measure designed to eliminate the ordinary political safeguards built into the legislative process.[1]

Respondent does not deny that FETRA imposes grossly disproportionate burdens on Swisher to benefit a small class of specifically identified

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[1] Respondent's only answer to this critical political process issue is to observe that FETRA was enacted in accord with prescribed lawmaking procedures – *i.e.*, that it was "passed by both Houses of Congress" and "signed by the President." Opp. 12-13 n.3. The point, however, is that the legislation was enacted through a process that carefully avoided the democratic safeguards that operate to constrain abuses in ordinary lawmaking.

private parties with whom Swisher has no meaningful nexus. Congress singled out cigar companies like Swisher to shoulder the cost of the buyout even though Swisher had only glancing involvement in the price support program, requiring Swisher to pay a sum that is some 30 times larger than could be justified based on past program participation. App. 96a-97a. Moreover, Swisher had no basis to anticipate the imposition of this staggering liability because it never had any employment relationship or other significant privity with any program beneficiaries, and because there was never any understanding, express or implied, that manufacturers would fund a "soft landing" for quota holders and producers if the program were ever repealed.

Respondent's only answer is to suggest that Swisher could remedy these inequities by exiting the cigar business altogether. Opp. 10, 17. Not surprisingly, Respondent cites no authority for the proposition that a privately held company that has been in business for over a century has no constitutionally recognized property interest in remaining in business. As Respondent would have it, the Government could fund the rebuilding of New Orleans after Hurricane Katrina by imposing prospective monetary assessments on businesses in Grand Rapids, Michigan, and the fact that the burdened businesses could shut down would be the beginning and end of the constitutional analysis. That obviously is not the law.

Respondent states inaccurately that FETRA "minimize[s] disruption to the tobacco industry" by "facilitate[ing] the transition to a free-market system." Opp. 2-3. This ignores that FETRA bestows

cash benefits on tobacco producers and quota holders *regardless of whether they continue to produce tobacco in the future.* 7 U.S.C. §§ 518a(c), 518b(c). It does not "regulate" the tobacco market prospectively, but merely transfers wealth from one narrow group of private parties to another. It is a social welfare statute. Opp. 8 (FETRA is intended "to avoid needless hardship").

Indeed, despite all of its claims that FETRA is "everyday" legislation, Respondent fails to identify a single legislative precedent for a scheme like this one. Indeed, the most directly analogous statute, a "buyout" for peanut quota holders, took a notably different (and constitutionally unproblematic) approach. *See* Pub. L. No. 107-171, 116 Stat. 179 (codified at 7 U.S.C. § 7959 (2002)) (providing for buyout to be funded by the general Treasury).

Finally, there is no merit to Respondent's reliance on *Personnel Adm'r v. Feeney*, 442 U.S. 256, 72 (1979), for the proposition that the Constitution is not concerned with the "uneven effects" of rational classifications. Opp. 10. Unlike in *Feeney*, here Congress went out of its way to sweep cigar manufacturers into the assessment scheme, did so consciously, and expressly singled the cigar manufacturer class out *by name*. 7 U.S.C. § 518d(c).

FETRA cannot be squared with the central premise of the Takings Clause: that it is unconstitutional to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Congress determined that "fairness and justice" did not support saddling tobacco quota holders with the "burdens" of an abrupt end to subsidies, but, as in *Norwood v.*

Baker, it sought to shift responsibility for the buyout to a narrow group of private parties. And, as in *West Lynn Creamery*, Congress insulated the private interests that ordinarily would have organized to oppose the measure from the impact of the scheme.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

Respondent does not deny that the Eleventh Circuit's approach – refusing to apply the Takings Clause to monetary assessments under any circumstances, and refusing to apply the Due Process Clause to assessments that are not "retroactive" – leaves a troubling gap in the protections afforded by the Fifth Amendment.

The prototypical unconstitutional taking is confiscating property from A for the purpose of giving it to B. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79-80 (1937); *Calder v. Bull*, 3 U.S (3 Dall.) 386, 388 (1798). But the Eleventh Circuit's approach allows just that – so long as the property is money and the confiscation is prospective. A statute providing that "all lemonade stands must pay ten percent of their gross revenues to John Smith" is perfectly constitutional. The Takings Clause does not apply to the confiscation of money at all, and the Due Process Clause is not offended because the taking is prospective, and a lemonade stand wishing to avoid the seizure could simply cease its operations. That simply cannot be the law.

Instead, at least one of two things must be true. Either (1) monetary assessment schemes implicate the Takings Clause, in which case courts

may use the tools that have been developed in Takings Clause jurisprudence to weed out those exactions that go too far from those that do not; or (2) the Due Process Clause requires meaningful scrutiny of monetary assessment scheme to ensure that the requisite nexus and proportionality elements are present, even where the scheme is not "retroactive."

This case, which arises from a narrow set of stipulated facts and presents both the Takings and Due Process questions, is an excellent vehicle for making sense of how to bridge the gap left by the Eleventh Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

August 2009

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No. 08-1361

In the
Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
Petitioner,
v.
TOM VILSACK, Secretary of Agriculture,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation and Southeastern Legal Foundation respectfully move this Court for leave to file the attached brief amicus curiae in support of the petition for writ of certiorari.[1] Pursuant to Rule 37.2(a), on or about May 6, 2009, counsel for Pacific Legal Foundation sent letters to counsel for both Petitioner Swisher International, Inc., and Respondent Tom Vilsack, giving notice of Pacific Legal Foundation's intent to file a brief on behalf of itself and other appropriate parties on or before June 4, 2009, and requesting written consent to file the brief. Counsel for Petitioner Swisher International, Inc., consented to the filing of this brief and such consent has been lodged with the Clerk of the Court. Counsel for Respondent Tom Vilsack, however, did not respond in any form before the filing of this brief, despite repeated requests by counsel for Pacific Legal Foundation.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded over 35 years ago, PLF is the largest and most experienced legal organization of its

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

kind. PLF maintains its headquarters in Sacramento, California, and has regional offices in Bellevue, Washington, and Stuart, Florida. The Foundation is supported primarily by donations from individuals interested in the preservation of traditional individual liberties. PLF attorneys have considerable experience litigating, as lead counsel and amicus curiae, in defense of constitutionally protected property rights. PLF attorneys have regularly appeared before this Court as lead counsel on behalf of landowners whose ability to use their property was unlawfully curtailed. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Southeastern Legal Foundation, Inc. (SLF), founded in 1976, is a national public interest law firm and policy center that advocates constitutional individual liberties, free enterprise and private property rights in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court of the United States. *See, e.g.*, *Suitum*, 520 U.S. 725; *Nollan*, 483 U.S. 825; *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas*, 505 U.S. 1003; *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009). SLF has been involved in litigation and public policy initiatives dealing with regulatory and property takings related to private property, as well as the imposition of state and local government fees. *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. Dist. Ct. App.

1990); *City of Stockbridge v. Meeks*, 283 Ga. App. 343 (2007) (eminent domain "takings").

The instant petition raises a significant question of federal law as to whether the Takings Clause of the Fifth Amendment applies to property in the form of money. PLF and SLF attorneys have a wealth of experience on this issue, having acted as lead counsel in cases questioning whether money is "property" within the meaning of the Fifth Amendment. *See, e.g.*, *City of Olympia v. Drebick*, 126 P.3d 802 (Wash. 2006); *Greater Atlanta Home Builders Ass'n v. City of Atlanta*, 149 Fed. Appx. 846 (11th Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006). PLF and SLF attorneys participated as amicus in cases that have examined whether money is "property" within the meaning of the Fifth Amendment. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008). PLF attorneys have also published law review articles relating to Fifth Amendment jurisprudence. *See, e.g.*, J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373 (2002). SLF attorneys drafted model state legislation in 2006 and 2007 providing significant reform of state eminent domain proceedings and limiting the power of local governments to condemn private property for the purposes of redevelopment. The model legislation was adopted and enacted in Georgia and served as a blueprint for similar reforms adopted in other states. PLF and SLF believe their experience in litigating and publishing on matters pertaining to federal takings claims will assist this Court in deciding whether to grant the petition in this case.

For all the foregoing reasons, the motion of Pacific Legal Foundation and Southeastern Legal Foundation to file a brief amicus curiae should be granted.

DATED: June, 2009.

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QUESTIONS PRESENTED

The Fair and Equitable Tobacco Reform Act, Pub. L. No. 108-357, 118 Stat. 1524 (codified at 7 U.S.C. § 518, *et seq.* (2004)) (FETRA) requires one class of private parties (cigar manufacturers) to make hundreds of millions of dollars in payments for the benefit of another class of private parties (former beneficiaries of the recently discontinued federal tobacco price support program), despite the absence of any meaningful connection between the parties Congress sought to assist and those Congress singled out to be burdened.

The court of appeals, relying heavily on this Court's splintered decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), held that monetary assessment schemes are not cognizable under the Takings Clause at all, and that, unlike the statute struck down in *Apfel*, FETRA comports with Due Process because it is not "retroactive."

The questions presented are:

1. Whether the monetary assessment schemes are *per se* immune from Takings Clause scrutiny on the ground that money is not "property" within the meaning of the Fifth Amendment?

2. Whether the highly deferential standard that governs Due Process challenges to ordinary regulatory or taxing legislation is appropriate where the law at issue effects a direct wealth transfer from one class of private parties to another?

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STATEMENT OF THE CASE

This case involves a constitutional challenge under the Takings Clause of the Fifth Amendment to the Fair and Equitable Tobacco Reform Act, Pub. L. No. 108-357, 118 Stat. 1524 (codified at 7 U.S.C. § 518, *et seq.* (2004)) (FETRA), a statute which forces the Petitioner to subsidize a buyout of tobacco growers.

In 1938, Congress implemented a system of quotas and price controls, to be administered by the Department of Agriculture, in an effort to address fluctuations in the price of various commodities, including tobacco, and their effects on farm incomes. *See* Pub. L. No. 75-430, 52 Stat. 31 (codified as amended in various sections of 7 U.S.C.); *see generally Wickard v. Filburn*, 317 U.S. 111, 115 (1942). Six decades later, Congress decided to end the tobacco price support program. However, members of Congress realized that a sudden discontinuation of the program would have harsh results for tobacco farmers who depended on the program. *Tobacco Quota Buyout: Hearing Before the House Committee on Agriculture*, 108th Cong. 4 (2003), at 18. Concluding that a "buyout" program would ease the transition to a free market system, Congress passed FETRA which provided that former program participants would be entitled to payments of $9.6 billion over a ten-year period. However, FETRA payments do not come from the general treasury, but are funded solely through monetary assessments levied against private parties, namely the manufacturers and importers of tobacco products such as the Petitioner, Swisher International, Inc.

After tendering its first FETRA payments and exhausting its administrative remedies, Petitioner sued the Secretary of Agriculture, arguing in part that FETRA violates the Takings Clause of the Fifth Amendment. Specifically, Petitioner claimed that the payments it was forced to make under FETRA were an unconstitutional taking, relying on *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-28 (1978), and the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The government defended FETRA by maintaining that the Takings Clause is *per se* inapplicable to statutes requiring the payment of money.

The district court denied Petitioner's takings claim, stating that the Takings Clause is not implicated when one party is required "to use his or her assets for the benefit of another." *Swisher Int'l, Inc. v. Johanns*, No. 3:05-cv-871-J16-TEM, 2007 WL 4200816, at *10 (M.D. Fla. Nov. 27, 2007) (not reported). The Eleventh Circuit affirmed, holding that the Fifth Amendment's Takings Clause is "not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation." *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1056 (11th Cir. 2008). The court reasoned that the Takings Clause does not apply to a taking of money, but instead "operates only as a conditional limitation, permitting the taking so long as the government pays just compensation," and is not "'a substantive or absolute limit on the government's power to act.'" *Id.* at 1055 (quoting *Eastern Enters.*, 524 U.S. at 545). Petitioner now seeks this Court's review, asking in part whether a statutory

obligation to pay money for a public purpose is subject to takings analysis.[2]

The Eleventh Circuit's decision that a taking of money is exempt from the protections of the Fifth Amendment conflicts with this Court's traditional and more recent decisions interpreting the Takings Clause. It also undermines the Takings Clause protections against unlawful permit conditions articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by allowing governments to make monetary exactions free of takings scrutiny. The Petition accordingly presents a constitutional issue of significant national importance, which warrants this Court's review.

ARGUMENT

I

THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S UNDERSTANDING OF THE SCOPE OF THE TAKINGS CLAUSE

A. This Court's Jurisprudence Is Designed To Protect All Forms of Private Property

This Court has recognized that the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

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[2] Petitioner also raised claims under the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause. Although supportive of these claims, *Amici* PLF and SLF do not address those claims here.

whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also* James L. Huffman, *Colloquium on* Dolan*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

The drafters of the Fifth Amendment understood that the term "property" was and would have to be broadly construed to fulfill the purposes of the Takings Clause. Thus, the Constitutional Framers eschewed legalistic and artificially narrow definitions of property, believing instead that the term "embraces every thing to which a man may attach a value and have a right." James Madison, *Property* (Mar. 27, 1792).[3] Included within this understanding is the principle that "a man's land, or merchandise, or *money* is called his property." *Id.* (emphasis added).

This Court long ago rejected rigid definitions of what is "property" within the meaning of the Takings Clause. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (That trade secrets are protected property interests "is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labor and invention.' 2 W. Blackstone, Commentaries *405; *see generally* J. Locke, The Second Treatise of Civil Government . . . ."); *Long Island Water-Supply Co. v.*

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[3] *Available at* http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (last visited May 29, 2009).

City of Brooklyn, 166 U.S. 685, 690 (1897) (finding that contracts are property subject to condemnation). Indeed, this Court has recognized that personal, as well as real, property is protected by the Clause. More to the point, it has recognized that the definition of "property" encompasses the most common repository of material value: money. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216, 240 (2003); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-64 (1980).

Justice Harlan observed over 100 years ago in *Village of Norwood v. Baker*: "[T]he power of the legislature . . . is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property." 172 U.S. 269, 278 (1898). In *Norwood*, Justice Harlan concluded that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.* at 279. In other words, the taking of money without associated benefit was subject to, and precluded by, the protections of the Takings Clause. *Id.*; *see also Houck v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915) (taking claim may arise when a monetary exaction is a "mere confiscation of particular property").

More recently, this Court analyzed expropriations of money under the Fifth Amendment as a physical invasion of property. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. at 234-35; *Phillips v. Washington Legal Found.*, 524 U.S. 156, 169-72 (1998); *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64. For

example, in *Webb's Fabulous Pharmacies*, this Court found that a Florida law allowing a county court to expropriate the interest that was earned on the money held by the court during an interpleader action was tantamount to a physical taking. 449 U.S. at 164 ("The earnings of a fund are incidents of ownership of the fund itself and are property. . . . [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent."). This Court employed similar reasoning in *Brown v. Legal Foundation of Washington*, when this Court unanimously held that a state's expropriation of the interest earned on lawyer trust accounts constituted a *per se* physical taking of property. 538 U.S. at 235 ("[T]he interest earned [on money] . . . 'is the "private property" of the owner of the principle.' ") (quoting *Phillips*, 524 U.S. at 172).

Fairly read, *Eastern Enterprises*, 524 U.S. at 503-04, does not dilute this Court's jurisprudence indicating the exactions of money, without proportionate benefit, implicates a taking of "property" under the Fifth Amendment. After all, in *Eastern Enterprises*, the majority of justices recognized that an obligation to pay money to past employees was either subject to analysis under the Takings Clause or Due Process Clause. *Id.* at 523; *id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part). Both constitutional provisions require a deprivation of "property." Since there is no reason to believe the term has a different meaning in the Due Process Clause than in the Takings Clause, the fact that Justice Kennedy, in his concurrence in *Eastern Enterprises*, invoked due process to evaluate the monetary obligation supports, rather than undercuts,

the proposition that money is constitutionally protected "property." This status in turn should trigger takings protections as well as the guarantees of the Due Process Clause. W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 54 (2d ed. 1998) ("[T]he Fifth Amendment contains two important property guarantees," one that no person shall be "deprived of life, liberty, or property, without due process of law," and the other that "private property [shall not] be taken for public use, without just compensation.).

In sum, this Court's historic and modern property rights jurisprudence indicates that money, like other forms of personal property, is protected by the Takings Clause. James J. Holland, *"Taking" Another Look at IOLTA: Applying Loretto's "Per Se" Test to Government Exactions of Money*, 39 Williamette L. Rev. 219, 239 (2003) ("[T]he Framers intended the Takings Clause to protect against the physical appropriation of both real and personal property."); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 588 (1997) (explaining that the original understanding of property encompassed "'not only tangible interests, but also values, beliefs, and opinions,' and personal possessions").

B. The Eleventh Circuit's Decision Conflicts with This Court's Understanding of Constitutionally Protected "Property"

The decision below cannot be squared with this Court's broad understanding of the property interests that are constitutionally protected. The Eleventh Circuit held that mandated subsidy payments to tobacco growers from a cigar maker was categorically

not subject to analysis under the Takings Clause: "Because 'no recognized property interest is implicated here, . . . there is no "taking."'" *Swisher*, 550 F.3d at 1056 (citation omitted). In contrast to the Constitutional Framers, who understood that the Takings Clause was designed "to protect property of *every sort*," including money, *see, e.g.*, Madison, *Property*, the Eleventh Circuit apparently believes that the Clause extends to far fewer interests, like those in land. *Swisher*, 550 F.3d at 1056-57. This categorical approach toward takings claims based on exactions of money is in manifest conflict with this Court's precedent and with the purpose of the Takings Clause—to protect property in all forms so as to preserve personal liberty. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. . . . That rights in property are basic civil rights has long been recognized."). Indeed the Eleventh Circuit neglects this Court's takings precedent addressing appropriations of money, even relegating many of these decisions to a footnote. *Swisher*, 550 F.3d at 1055 n.6. The decision below, holding that the Takings Clause utterly fails to protect a business against an approximately $10 million fee, is unsupported by this Court's Takings Clause jurisprudence, *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64; *Brown*, 538 U.S. at 235, and the Court should grant review to resolve the conflict.

II

THE LOWER COURT'S DECISION THREATENS THE VIABILITY OF EXISTING LIMITATIONS ON THE GOVERNMENT'S POWER TO EXACT PROPERTY AS A LAND USE PERMIT CONDITION

The Eleventh Circuit's decision undermines this Court's precedent limiting the government's power to demand property as a condition of approving a land use permit. In particular, a *per se* rule that money is not property for purposes of the Takings Clause, encourages governments to evade the constraints this Court has imposed on permitting exactions simply by shifting from demands for real property to demands for cash.

A. *Nollan* and *Dolan* Established Limits on the Ability of Government To Demand Property in Exchange for a Building Permit

1. The *Nollan* and *Dolan* Standards

An exaction is a requirement that a property owner provide a benefit to the government in return for receiving permission to use land. Exactions can take any form, including dedications of land and cash payments. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 490-91 (2006). In *Nollan* and *Dolan*, this Court formulated the two-part essential nexus and rough proportionality test to determine whether an exaction constitutes an impermissible taking. First, the reviewing court must determine whether there is a connection between the exaction and the impact that would otherwise be caused by the unregulated use of

the owner's property. *Nollan*, 483 U.S. at 836-37. If an essential nexus exists, the court must decide whether the required exaction "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The burden of proving nexus and proportionality is on the government, not the property owner. *Id.* at 391 n.8. Proper application of this burden is essential to prevent a government entity from using its permit approval authority to coerce illegal exactions. An exaction that is not supported by nexus and proportionality is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted).

2. *Nollan* and *Dolan* Logically Apply to All Permit Exactions, Including Demands for Monetary Payments, and Many Courts Have So Held

Although *Nollan* and *Dolan* challenged exactions of real property interests, many local governments use impact fees—demands for cash payments as a permit condition—as a means of obtaining public benefits from permit applicants. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1519 (2006) (discussing the marked shift in local government financing from general revenue taxes to "nontax revenue raising devices" like exactions). Approximately 80% of jurisdictions impose impact fees on new development. Duncan Associates, *National Impact Fee Survey: 2008*, at 8 (Oct. 2008).[4] Between 2004 and 2008, the amount of money charged as an impact fee,

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[4] *Available at* http://www.impactfees.com/publications%20pdf/2008_survey.pdf (last visited May 29, 2009).

generally ranging from thousands to tens of thousands of dollars per new housing unit, grew an average of 76%, with some jurisdictions increasing fees up to 225% within that four-year period. *Id.* at 7. In some areas of California, for example, impact fees are estimated to have grown to approximately $80,000 to $90,000 per new home in 2008. Jim Wasserman, *Home Front: Impact Fees May Be the Next Battlefield for Area Builders*, The Sacramento Bee, Dec. 19, 2008, at 8B.[5] Impact fees are so pervasive that they affect nearly every aspect of housing, to the serious detriment of housing affordability. *See* Theo S. Eicher, *Growth Management, Land Use Regulations, and Housing Prices: Implications for Major Cities in Washington State*, at 10 (Feb. 2008) (Estimated cost of regulation and impact fees constitute nearly half the value of Seattle homes).

The "nexus" and "proportionality" rules articulated in *Nollan* and *Dolan* logically constrain governments from demanding excessive impact fees and other exactions of money that are not sufficiently related to the impact of the development on which they are imposed. *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996) ("[W]e reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed . . . on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered."). Although this Court has not directly addressed *Nollan* and *Dolan*'s applicability to impact fees, many lower courts have. They have generally concluded that an effective constitutional

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[5] *Available at* http://www.sacbee.com/736/story/1485548.html (last visited May 29, 2009).

limitation on governmental permitting power requires courts to construe *Nollan* and *Dolan* to apply equally to monetary and real property exactions. *See, e.g., City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (impact fees are subject to *Nollan/Dolan* analysis); *accord Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641-42 (Tex. 2004); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697-98 (Colo. 2001); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000); *N. Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 388-90 (Ill. 1995); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994).

Applying constitutional limits to monetary exactions advances public policy by allowing the government to charge money to off-set the impacts of a particular development, while preventing the government from forcing developers to pay or cede property to rectify problems they did not cause. *See* Fred P. Bosselman, Dolan *Works*, *in Takings Sides on Takings Issues: Public and Private Perspectives* § 14 (Thomas E. Roberts, ed. 2002).

3. The Decision Below Undermines the Limitations of *Nollan* and *Dolan*

The Eleventh Circuit's categorical rule that money is not property within the meaning of the Takings Clause conflicts with and undermines the understanding that impact fees and monetary exactions are subject to the constraints articulated in *Nollan* and *Dolan*. Lower courts often look to general precedent

involving the nature of "property" protected by the Takings Clause when faced with the question of whether an impact fee is subject to *Nollan* and *Dolan*'s takings standards. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008); *Town of Flower Mound*, 135 S.W.3d at 635-40. The lower court's decision that "money is not property" will encourage governments to demand exorbitant cash payments as a permit condition, foreclosing the ability of affected property owners to invoke the protections of *Nollan* and *Dolan* in court. *McClung*, 548 F.3d at 1225.

There are important public policy reasons for avoiding this result. If governments can seek and obtain money as a permit condition free of *Nollan* and *Dolan*, they will use that route to obtain the same public benefits indirectly that they could not obtain directly. A government desiring to leverage the permit process to obtain a public trail on private property, as in *Nollan*, would simply demand enough money to purchase the desired real estate, rather than demanding a direct concession. *See, e.g.*, John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. Puget Sound L. Rev. 1259, 1299 (1993) ("*Nollan*'s nexus analysis is based on constitutional principles that do not change simply because the government demands money rather than land."). A property developer's right, under the Takings Clause, to be charged only for those impacts on infrastructure arising from his own development, rather than for a general societal problem, would be eviscerated by the simple expedient of a demand for a cash payment. This is exactly why lower courts have refused to create a "money" loophole in *Nollan* and *Dolan*. *Id.* at 1318; *see also* Haskins, 38 Urb. Law. at 496-501.

In adopting a *per se* rule that monetary obligations are not subject to takings analysis, the Eleventh Circuit's decision threatens the viability of *Nollan* and *Dolan* as effective limits on governmental permitting powers. This Court should review the decision below to clarify that there is no *per se* rule against takings claims based on monetary fees, and to ensure that the functioning *Nollan* and *Dolan* regime is not destroyed by such a rule. *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules . . . must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances . . . .").

CONCLUSION

For these reasons, Amici respectfully request that the petition for writ of certiorari should be *granted*.

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Respectfully submitted,

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